PETITION NOT PRINTED

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 561

JAMES M. BUSHNELL, PETITIONER,

vs.

O. B. ELLIS, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED FEBRUARY 25, 1960
CERTIORARI GRANTED DECEMBER 5, 1960

Supreme Court of the United States

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[fol. A]

IN THE 128TH DISTRICT COURT OF ORANGE COUNTY, STATE OF TEXAS

INDICTMENT—Filed Feb. 22, 1944

In the Name and by the Authority of the State of Texas

THE GRAND JURORS for the County of Orange, State aforesaid, duly organized as such, at the January Term, A.D. 1944, of the District Court for said County, upon their oaths in said Court present that James M. Bushnell on or about the 12th day of February A. D., one thousand nine hundred and Forty-Four and anterior to the presentment of this Indictment, in the County of Orange and State of Texas did, then and there unlawfully In and upon H. L. Myers make an assault; and did then and there, by the said assault, and by violence to the said H. L. Myers, and by putting the said H. L. Myers in fear of life and bodily injury fraudulently, and without the consent of the said H. L. Myers take from the person and possession of him, the said H. L. Myers Two Hundred ($200.00) Dollars in money, the same being the property of the said H. L. Myers, with the intent to deprive the said H. L. Myers of the same, and to appropriate the same to his, the said James M. Bushnell's own use, against the peace and dignity of the State.

C. H. MEEKS
Foreman of the Grand Jury

[fol. B] No. 4496

THE STATE OF TEXAS

vs.

JAMES M. BUSHNELL

INDICTMENT

OFFENSE—ROBBERY BY ASSAULT

A TRUE BILL.
C. H. Meeks, Foreman of Grand Jury

FILED 22 day of February, 1944
T. M. Dodd, Clerk District Court
By ....., Deputy

Amount of Bail, $.....

NAMES OF WITNESSES

H. L. Myers
Hop Williamson
I. W. Thompson
Kenneth Stephenson
Robert Marshall
Henry Chastian

THE STATE OF TEXAS)
COUNTY OF ORANGE)

I, Mrs. T. M. Dodd, Clerk of the 128th District Court of Orange County, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original Bill of Indictment, filed in said Court on the 22 day of February A. D. 1944, in Cause No. 4496, styled The State of Texas vs. JAMES M. BUSHNELL.

Given under my hand and the seal of said Court, at office in Orange, Texas, this 29th day of May A. D. 1959.

/s/ Mrs. T. M. Dodd
MRS. T. M. DODD, Clerk

(SEAL)

By ..... Deputy

[fol. 1] IN THE DISTRICT COURT OF
ORANGE COUNTY, TEXAS

No. 4496

THE STATE OF TEXAS

vs.

JAMES M. BUSHNELL

STATEMENT OF FACTS

BE IT REMEMBERED that the above entitled and numbered cause came on for hearing in its regular turn on the Docket of the First Judicial District of Texas, in Orange County, Texas of said District, on June 5, 1944, the same being a regular term day of the regular May, 1944 Term of said Court, before the Honorable F. P. Adams, Judge Presiding, and a jury, beginning on said date and continuing thereafter until completed, when the following proceedings were had and the following evidence adduced, to-wit:

APPEARANCES

Joe J. Fisher, District Attorney of the First Judicial District of Texas
and
W. P. Sexton, County Attorney of Orange County, Texas
COUNSEL FOR THE STATE OF TEXAS

James M. Bushnell
COUNSEL FOR HIMSELF

A. L. MYERS, a witness called by the State, having been first duly sworn, upon his oath testified as follows, to-wit:

[fol. 2] DIRECT EXAMINATION

BY MR. FISHER:

Q. State your name, please?
A. A. L. Myers
Q. Where do you live, Mr. Myers?
A. Buna.
Q. What business are you in, Mr. Myers?
A. Carpenter.
Q. How long have you lived in Buna?
A. I have lived there since January of this year.
Q. Since January of this year?
A. Yes, sir.
Q. Where did you live prior to moving to Buna?
A. Vidor, Texas about four or five years, in Orange County.
Q. State of Texas?
A. Yes, sir.
Q. How long did you live in Orange?
A. I was born and raised in Orange, in the Cove, and I moved from the Cove when I was about seventeen, and then I moved back to Orange about five or six years back. moved to Vidor, back to Orange County.

On approximately January 1st of this year, I sold out and moved to Buna.

Q. Have you always been a carpenter by trade?
A. Yes, sir.
[fol. 3] Q. Are you working at that trade at this time?
A. Yes, sir.
Q. How old are you, Mr. Myers?
A. Fifty-nine.
Q. Fifty-nine?
A. Yes.
Q. Mr. Myers, on or about February 12, 1944, were you in Orange County?
A. Yes, sir, I was in Vidor.
Q. Texas?
A. Yes, sir.
Q. Did anything happen to you on that date—
A. Yes.

Q. —in Orange County with regard to being robbed?

A. Yes, sir.

Q. Will you in your own words tell the court and jury what you were doing and how it all happened?

A. I had sold out my place in Vidor, and I was building in Buna. I was buying lumber up on the Evadale Road to build. I was going up there to buy a lumber bill, and my car gave out of fix. And I knew of two men that was working in Orange from up there, and I thought soon they would come along and give me a push. Well, I sat on the road about an hour before I could get a push from there where I was at. So two men came along and pushed me to Vidor. They said "We'll get you to work, we work [fol. 4] in Orange". So then I was waiting there to get a mechanic to fix my car, and I stopped the car, running, in a low place, and it slipped back into a ditch. The wheels of the car would roll a little while and stop, roll a little while and stop, and I couldn't get out. So I walked in a beer tavern there and asked if anyone in there had a car to pull me out, and two boys said "Yes, we will pull you out. Have you got a chain in your car?" I said "Yes, I'll go to my car and get the chain". So the boys pulled me out of the ditch and pulled me up the road and stopped.

Q. Did you find out who the boys were?

A. Yes, sir.

Q. Was one of them Robert Marshall?

A. Yes, sir.

Q. Is the other one in the army?

A. Yes, sir. So I asked them what I owed them and they said "Anything you want to", so I gave them $2.00. He said "Being you gave me $2.00, I'll buy you a beer". So they bought a beer and brought it out. And this man, another guy, was asking me "Are you alone?" and "Jesus, ain't it cold?" and asked a few questions, and so on, and I was on the road there and it was gold, anyway, and he said "What do you think of going out awhile?", and I said "What about getting my car fixed?" This fellow called me "Dad", and he said "Dad, get in, get in, I'll carry you to get a mechanic."

Q. That is this man Bushnell you are referring to?

[fol. 5] A. Yes, sir. Well, I got in the car and he

started, but instead of going up this way, he started turning down the Parnell Road.

Q. You got in this defendant's car?

A. Yes, sir.

Q. Anybody else?

A. Just me and him. So he gave me this drink and in a minute I began to feel numb and doped. I said "This is not working like a real drink", and then he reached down and got a six-shooter. I gathered then that my days was numbered, and that he had doped me. And down there one place where the road was muddy, he started to stop, one place, but then he went on trying to pick what he thought was a good place. He drove a little further and stopped and said "Get out here". I got out, and he cursed me and he held the gun on me and hit me. This scar here (witness indicating), it cut clear to the bone. They sewed it up at the hospital. My nose was cut in two.

Q. Your nose was cut?

A. Clear to the bone.

Q. (Counsel indicating on witness.) Those three places?

A. Yes, sir.

Q. What scars are there?

A. Left eye, and a scar on my right eye, and my nose. [fol. 6] Q. A scar over your left eye as well as your right eye, and your nose, and this big scar—

A. Yes, sir, that's the one he gave me. He held the gun on me and said "I'm a good mind to shoot a bullet through your brain". He taken everything, my money, gas ration tickets, and everything. I never had nothing. So I stayed in the ditch about two hours or two hours and a half. This boy made sure of this by getting me off that far and beating me. I was bleeding and hurting, and when I come back, I come back crazy, bleeding, blood in my nose. I might near bled to death. And this other boy got suspicious of this boy taking me off, and so they went to get a constable, and they started hunting me and found me, walking. So they got after him then, asked me his description and I described him and they caught him. He taken about $210.00. I had one $100 bill and the other in $50s; I might have had one $5. They got back $128.00, and he said he spent the other in a gambling dump.

Q. That's Bushnell?

A. Yes, sir.

Q. How much did he get off of you altogether?

A. About $210.00.

Q. And how did he get that?

A. He taken it out of my pocket, out of this pocketbook right here.

Q. Were you in fear of your life, of bodily injury?

[fol. 7] A. I guess I was. It was dark as a dungeon, and the road was muddy, and brother, dark as pitch. I guess I was. It was raining and muddy, and thundering, the worst you ever saw. I guess I was scared, getting hit over the head and in the face. Brother, anybody would have been scared.

Q. And he beat you, put a gash over your left eye?

A. Yes, sir.

Q. And on your nose and your right eye?

A. He did. I was as—so bloody you couldn't tell what I was made of.

Q. Did he hit you with the pistol?

A. Yes.

Q. Did he ever shoot it?

A. No, he never shot it. He threatened to shoot a bullet through my brain.

Q. Had you ever seen the defendant before this?

A. No, not before that night.

Q. You, of course, didn't give him your consent or permission to take your money?

A. No, sir.

Q. Are you certain he is the one, quite positive?

A. Yes, and he taken all—

Q. You say he took some other possessions?

A. Yes, he taken all my ration books, every ration book I had. We got the A cards, they was on him, and my [fol. 8] eyeglasses. He even taken my eyeglasses and hid them, stuck them in the cushion of his car. They got my eyeglasses and A cards, also. The C card was gone and all my food books was gone, my driver's license. I've had to renew all that over in Vidor. This pocket book and the driver's license was sent back to the sheriff's department from Longview.

Q. Is this your billfold?
A. Yes.
Q. You have that?
A. Yes.
Q. Let's see that, Mr. Myers?
A. (Witness tenders pocketbook.)
Q. That billfold was taken off you that night?
A. Yes.
Q. And you later received it through the sheriff's department?
A. Yes, sir.
Q. And about what time of the night did this happen?
A. Oh, I imagine about 10:30 was when it happened.
Q. 10:30?
A. Yes, sir.
Q. How far did you have to walk?
A. About 3½ miles. I had to walk about three and a half miles way down off that Old Ferry Road back up in the woods.
Q. Before you were able to get any help?
[fol. 9] A. I couldn't get any help, no, sir.
Q. Were you in a sort of serious condition?
A. Yes, I was in bad condition. I liked to bled to death, walking all over the road, I was so weak from loss of blood.
Q. Did you try to talk him out of injuring you?
A. No, because it wasn't no use. If I begin to begging and pleading, he was liable to have shot me. Then he could have told the tale.
Q. Did he say anything about the whiskey?
A. No, he said "You cold?" and then he said "Take a drink". And that's when I began to feel numb and doped, and I knew I was doped.
Q. Have you ever seen this Bushnell prior to that night?
A. No, not before that night, that I remember. I never saw the man before that night.
Q. You didn't know him?
A. No, sir.
Q. You know he is the man that robbed you that night?
A. Yes, sir.
Q. And assaulted you?
A. Yes, sir.

Q. Did this happen in Orange County, State of Texas?
A. It sure did.
Q. And at that time, what time of the day was it?
[fol. 10] A. About 12:00 o'clock.
Q. And that was February of what year?
A. This year.
Q. I believe you stated that the officer later returned your gas ration book?
A. Yes, sir, the A. They got them off of him and part of the money.
Q. And some of your money?
A. Some of my money, and my eyeglasses.
MR. FISHER: I believe that's all.
BY THE COURT: Do you have any questions?
BY THE DEFENDANT: Yes, sir.

CROSS EXAMINATION

BY THE DEFENDANT:

Q. You said the night that you claim you was robbed was in February. Didn't you say it was in February when you were robbed?
A. Yes.
Q. They arrested me the 4th of January. The night they claim you were robbed—when you claim I was robbing you, I was delirious. I passed out. I remember I was taking medicine, and as far as remembering anything about it, I don't.
BY THE COURT: You may not testify. You ask him questions. You can tell that when you take the stand.
Q. You say your pocketbook was sent back from Longview?
A. Yes.
[fol. 11] Q. And you say that I robbed you?
A. You did.
Q. You are wrong; I never seen you in my life.
BY THE COURT: You need not consider that. (To the witness: You just ask questions.)
BY THE COURT: Is that all you want to ask?
BY THE DEFENDANT: That's all I want to ask, yes.

RE-DIRECT EXAMINATION

BY MR. FISHER:

Q. He not only robbed you, but he assaulted you bodily?
A. He really did.
Q. Injured both eyes, and on your head?
A. Yes, sir.
Q. Do you know how your pocketbook got to Longview?
A. No, I don't.
Q. Do you know of any connection this defendant had with anybody that might be up there?
A. Well, I couldn't prove exactly, no, but the officer could. He can tell us.
Q. The officer could, you say?
A. Yes, sir.
MR. FISHER: I believe that's all, Mr. Myers, thank you.

RE-CROSS EXAMINATION

BY THE DEFENDANT:

Q. You said I had a gun?
[fol. 12] A. I said you had a gun.
Q. I never owned a gun in my life.
BY THE COURT: You can testify to that when you get on the stand. Is that all?
BYTHE DEFENDANT: That's all.
(Witness excused.)

CLYDE WILLIAMSON, a witness called by the State, having been first duly sworn, upon his oath testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. FISHER:

Q. Your name is Clyde Williamson, Hop?
A. Yes, sir.
Q. A constable of Orange County, State of Texas?
A. Yes, sir.
Q. What precinct?
A. Precinct 4.

Q. And you were an officer on or about February 12, 1944?

A. Yes, sir.

Q. Mr. Williamson, Do you have any knowledge of a robbery that took place out in your precinct on that night which Mr. H. L. Myers was robbed of some money?

A. Yes, sir.

Q. Will you go ahead and relate to His Honor and the jury the details of your investigation, how the matter [fol. 13] came to your attention and what you did?

A. There was a couple of boys come to me and told me that there was a fellow that picked up Mr. Myers.

Q. Do you know whose those boys were?

A. Robert Marshall, and Stephens.

Q. Is Robert Marshall here?

A. Yes.

Q. Do you know where Stephens is?

A. He is in the army.

Q. All right.

A. So they said that they saw him with a gun and said he turned off the wrong way to get him home, and said "Hop, you better look and see about it; it don't look right". So I got to hunting him. I started hunting him about 9:00 or 9:30, something like that, just guessing—I never looked at the time.

Q. And you found him about—?

A. Around 4:00 or 4:30. He was all beat up, coming down the road, dirty and bloody and didn't have his good sense, hardly. He was in pretty bad shape.

Q. That was Mr. Myers?

A. Mr. Myers.

Q. Did he tell you what happened?

A. Yes, and then I put a pickup on the radio to pick him up.

Q. Did he tell you what happened, without relating it? [fol. 14] A. Yes, he told me what happened.

Q. What did you do then?

A. I began to look for him. I put a pickup on the car. I first put a pickup on it for investigation, then after I saw Mr. Myers, I put a pickup on it for the highjacking. Then we started out looking for him. We made every hotel here in Orange, we went to every one of them. We

found out three or four places where he had stayed, and we made them one by one, and was fixing to take a ride down here by the track, a hotel right by the depot, and the boy that was with me pointed and said "There he goes now".

Q. Who was with you?

A. Harry Christian. We took out after him and he took out. We were riding down Green Avenue, and we run him until we caught him. Then we brought him back over here and searched him, and got one issue of gas coupons, and money, and whatever was on him.

Q. How about a billfold?

A. He didn't have a billfold. I asked him what he done with the billfold, and he said he threw it away.

Q. You did recover some money and gas coupons back?

A. Yes.

Q. How about the glasses, did you get them?

A. I got the glasses. He pushed them down behind the seat.

Q. Did you give those glasses and gas coupon book [fol. 15] to Mr. Myers?

A. Yes, sir.

Q. Did you put him in jail?

A. I put him in jail.

MR. FISHER: I believe that's all.

BY THE COURT: Any questions?

BY THE DEFENDANT: Yes, sir.

CROSS EXAMINATION

BY THE DEFENDANT:

Q. You arrested me in Louisiana; you went over in Louisiana and got me.

A. I run you to Louisiana.

Q. I came from Lake Charles. I came back from Lake Charles, and he came across the river and arrested me.

BY THE COURT: You can testify to that when your turn comes up.

Q. Well, you beat me up across in Louisiana?

A. I never touched you over there.

Q. I have scars to prove it on my back.

A. I ain't touched you but once.

Q. You jerked me out of my car over on a Louisiana State Highway, no Louisiana law, just you and two kids, and beat me up without mercy.

A. It wasn't over in Louisiana.

BY THE DEFENDANT: That's all.

MR. FISHER: That's all.

(Witness excused.)

[fol. 16] ROBERT MARSHALL, a witness called by the State, having been first duly sworn, upon his oath testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. FISHER:

Q. State your full name, please?

A. Robert Marshall.

Q. Where do you live, Robert?

A. Vidor.

Q. That's in Orange County?

A. Yes, sir.

Q. How long have you lived in Vidor, Robert?

A. About seven years, it will be this August.

Q. Robert, do you remember an occasion on or about February 12, 1944 in Vidor on which you saw Mr. H. L. Myers and this man here, this defendant, James Bushnell?

A. Yes, sir.

Q. Will you go ahead and tell the Court and jury what you know about seeing Mr. Myers that night and also seeing this defendant?

A. Well, me and a boy friend of mine was in a place in Vidor, a beer parlor, Capp's Place in Vidor.

Q. Who was your boy friend?

A. Kenneth Stephens.

Q. He is in the service now?

A. Yes.

[fol. 17] Q. All right.

A. We was there and Mr. Myers come by, and he asked us to pull his car out of the ditch. Kenneth asked him did he have a chain, he said "Yes", so we went out and his car was backed in a ditch. I got in Mr. Myers car.

and Kenneth pulled his car out. I drove it across the highway in front of the place when we got it out. So I got out of the car and went on inside, and then Kenneth come in and bought some beer.

Q. Just a minute. Go back some. The jury probably couldn't hear you. You and Kenneth were asked to help Mr. Myers pull his car out?

A. Yes.

Q. All right, pick up up from there.

A. I went inside and then Kenneth came in and said he would buy some beer and take it to Mr. Myers outside. so he went out the door with some beer. I went out after him, and I saw this fellow here. He was inside and had come back outside and got in a car. Mr. Myers was standing there drinking a beer and he went over to this fellow's car. Me and Kenneth was standing there talking, and he left.

Q. You just saw him get in this man's car?

A. Yes, sir.

Q. And saw them leave together?

A. Yes, sir.

Q. All right, what did you do then?

[fol. 18] A. Kenneth said "I don't believe he was taking him home; let's go and tell Hop to watch and see where he went". We couldn't find Hop, so we went back to the cafe to catch a ride and found Hop and told him about it.

Q. Had you ever seen this party before, James Bushnell?

A. I saw him about once or twice.

Q. Did you know who he was?

A. No.

Q. Did you know anything about him?

A. No.

Q. You do know he is the man that picked up Mr. Myers that night?

A. Why, sure, Mr. Myers left with him.

Q. In a car?

A. Yes, sir.

MR. FISHER: I believe that's all.

BY THE COURT: Do you have any questions?

BY THE DEFENDANT: No.

(Witness excused.)

W. P. SEXTON a witness called by the State, having been first duly sworn, upon his oath testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. FISHER:

Q. Your name is W. P. Sexton?

[fol. 19] A. Yes, sir.

Q. You are county attorney of Orange County, State of Texas, are you not?

A. Yes, sir.

Q. You were county attorney of this county on or about February 12, 1944?

A. Yes.

Q. Did you have occasion to take a statement from this defendant, James Bushnell?

A. Yes, sir.

Q. On or about that time?

A. Yes.

Q. Did he give you a statement regarding a robbery of a man by the name of Myers, Mr. H. L. Myers?

A. Yes.

Q. Mr. Sexton, before he gave this statement to you, did you warn him he didn't have to make this statement at all, and that any statement he gave could be used as evidence on the trial for the offense concerning which the statement was made?

A. Yes.

Q. Did he then make a statement to you about that offense?

A. He did.

Q. Did you reduce it to typewriting?

A. I did, sir.

[fol. 20] Q. After you had written it, did he read it or have it read to him?

A. If I remember correctly, I believe he read it.

Q. And he then signed the statement?

A. Yes.

Q. Mr. Sexton, I hand you this statement. Will you tell me whether or not this is the statement that James M. Bushnell made on that occasion and is the statement he signed?

A. Yes, sir.

MR. FISHER: We would like to introduce it in evidence, Your Honor.

(Whereupon, the instrument tendered by counsel for the State was received in evidence by the Court, marked by the reporter for identification as State's Exhibit No. 1, and a true and correct copy thereof is as follows:)

STATE'S EXHIBIT NO. 1

"THE STATE OF TEXAS
COUNTY OF ORANGE

I, James M. Bushnell, being in the custody of Hop Williamson, Constable of Precinct No. Four, Orange County, Texas, and having been warned by W. P. Sexton, the person to whom the hereinafter set out statement is by me made, that I do not have to make any statement at all, and that any statement made by me may be used in evidence against me on the trial for the offense concern-
[fol. 21] ing which this statement is made, do here make the following voluntary statement in writing to the said W. P. Sexton, towit:

My name is James M. Bushnell and I am twenty-five years of age. On the night of February 12, 1944, I was at Vidor, Texas, at a beer joint. While at this beer joint I drank quite a bit of rum and beer and took some amatol tablets. I then left the place and a man whose name I do not know got in the car with me. I rode down a side-road from Highway #90 approximately three miles. I then robbed this man and took what money he had on his person from him, which was approximately $200.00 in currency. During the robbery I hit him with a beer bottle and struck him with my fists. I then put him out of the car and then drove to Orange, Texas; I was arrested just across the Sabine River Bridge by Mr. Hop Williamson and Mr. I. W. Thompson. I returned from Louisiana

voluntarily with Mr. Hop Williamson. I was convicted in the State of Louisiana for swindling with worthless checks approximately three years ago and served a term in the Louisiana State Penitentiary.

I make this confession voluntarily and I was not coerced or threatened by Mr. Williamson or Mr. Thompson or by Mr. W. P. Sexton, the County Attorney, in the making of this statement. The same is true in every respect and I realize that by the making of this voluntary statement that the same can be used against me on my trial. [fol. 22] Witness my hand this 14th day of February, 1944.

/S/ James M. Bushnell

Witnesses:

/S/ Mrs. Mollie Gunstream

/S/ Lois Watson "

MR. FISHER: That's all.

BY THE COURT: Do you have any questions?

BY THE DEFENDANT: Yes, sir.

CROSS EXAMINATION

BY THE DEFENDANT:

Q. At the time they brought me inside your office, I was threatened about the statement, is that right?

A. You didn't tell me anything about it, did you?

Q. You were in the office.

BY THE COURT: Did he know it?

A. Yes, sir, I don't see why he couldn't keep from hearing it.

BY THE COURT: Well, ask him.

Q. When he threatened, the Constable threatened to take me out and tie me, and take me out and cow-whip me, unless they did get a confession, is that right?

A. I didn't hear that.

Q. You were in there. That's all.

RE-DIRECT EXAMINATION

BY MR. FISHER:

Q. Did he look like he had been abused?

[fol. 23] A. He was—he had a bandage on his head, yes, sir.

Q. When you took this statement from him, you gave him the warning you just stated?

A. I gave him the warning.

Q. Did he tell you then about being mistreated or abused?

A. He didn't tell me anything.

Q. Did he tell you the statement he was making was true?

A. That is what he told me.

Q. Did he tell you he was being forced to make that statement?

A. No, sir, he did not.

Q. Did he refuse in any way to make the statement?

A. No, sir, he did not.

MR. FISHER: I believe that's all.

RE-CROSS EXAMINATION

BY THE DEFENDANT:

Q. One think else I would like to ask. I was brought to your office, they said I had to sign a statement, said that day if it wasn't signed, they would get it one way or the other. You were sitting across the desk from me, and I couldn't read, my eye was closed.

A. No, sir, no such conversation as that took place, friend.

Q. Can you prove that is where this was, in your office?

[fol. 24] BY THE COURT: Is that all?

BY THE DEFENDANT: Yes, sir.

(Witness excused.)

L. G. STANDFIELD, a witness called by the State, having been duly sworn, upon his oath testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. FISHER:

Q. Mr. Standfield, you are sheriff of Orange County, State of Texas, are you not?

A. Yes, sir,

Q. Do you know anything about a pocketbook belonging to Mr. Myers?

A. Well, there was a deputy from—I believe it was Kountze, rang me and said he had found it, with some——and that two boys had brought it to him and said they found it between Terry and Connell.

Q. And that was a pocketbook that was identified as belonging to Mr. Myers?

A. That's right.

Q. This deputy was from where?

A. From Kountze, I believe it was.

Q. Do you know how it happened to be there?

A. He said these two boys were coming from Orange and found it and picked it up on the road, right in the [fol. 25] middle of the road, between Terry and Connell:

Q. That's in Orange County?

A. Yes, sir.

MR. FISHER: I believe that's all.

BY THE COURT: Do you have any questions?

BY THE DEFENDANT: No, sir.

(Witness excused.)

STATE RESTS

JAMES M. BUSHNELL, defendant, on behalf of himself, presented the following evidence after having first been duly sworn, to-wit:

BY THE DEFENDANT: Well, on the night of this robbery case you have charged me with—on Saturday—it's on a Saturday night they claim he had been to Buna, and came back by Vidor. I was standing in this little tavern. I was in there drinking. There was four boys at the same table I was. I didn't have whiskey, I had rum and I had taken some femotal and I drank some beer. That's the last I remember. When I woke up my car was over there by Louisiana.

They woke me up out of the back end of my car and gave me some coffee. It was one o'clock when I woke up and I drove my car to Lake Charles, Louisiana. When I got there, I ate breakfast and stood around town awhile. And I was coming back, on my way home, I live at Dequincy, and there was that law, Mr. Hop Williamson and [fol. 26] Thompson, and they caught me, and they stopped me and come back where my car was and jerked me out and beat me up. They threatened me, and I said "Why can't a man get justice?" And they said "You can't get justice here or in a courtroom", and they threatened to kill me. After they beat me up, they brought me to the police station and taken me up there and tried to get me to confess, and Thompson stomped me while I was on the floor, and I'm ruptured from it now. I have scars on my back I'll show you.

MR. FISHER: Pull your shirt off and show it to them.

BY THE DEFENDANT: Sure, I'll show it. This is what I told Mr. Bill Sexton in his office that day. I was beat worse than a dog; then when they got through beating, they taken me in an office and sat me in a chair and knocked me down. He said "I'm going to slap you—I'd like to kill you, but I want to do it the right way." He knocked me out twice and when they got through knocking me around, they threw some water on me, and then they threw me down the stairs. They was going to put me in the City, but they changed their minds and brought me to the County Jail. I laid there and then they took me to the hospital, my head ..... something wrong in my head, and also they gave me some stuff to put on my side. I was arrested in Louisiana without a permit, they went over and got me across the State line with a constable from Orange. Hop Williamson and Thompson is the men that done it. That is all I [fol. 27] have to say.

MR. FISHER: Now are you through?

BY THE DEFENDANT: Yes.

CROSS EXAMINATION

BY MR. FISHER:

Q. Can you think of anything else, is that all the things you can think of where you say were were abused?

A. Yes, one more thing, too. I'm not guilty of this charge they got me on, I'm framed, I'm not guilty. The $235.00 I got from my mother, she's not able to be here. I had borrowed $235.00 from a man in town—you don't have to take my word for that. Go down to the Mary Ann and Mr. Hardin, he can tell you.

MR. FISHER: Is that all?

BY THE DEFENDANT: Yes.

Q. You say you are being framed in this thing, that you are not guilty of this offense?

A. I am not.

Q. You didn't see Mr. Myers that night, or didn't rob him?

A. I never seen that man in my life.

Q. You didn't beat him about the head, as he testified?

A. No.

Q. You didn't take the money from him?

A. No.

[fol. 28] Q. You didn't get him in your car?

A. No.

Q. You didn't give him any liquor with any amatol in it?

A. I don't know anything about it. I was passed out in that place.

Q. Well, if you were passed out, you ought to be able to state definitely that you didn't give it to him, if you were passed out?

A. When a man passes out—I was under fematol. I got a medical discharge out of the Army, I served three years in the Hawaiian Islands.

Q. You don't have that with you, do you?

A. No, sir.

Q. What year did you get out in?

A. It's at home.

Q. You don't carry it around with you?

A. No.

Q. I thought you had been in the State Penitentiary for three years, in Louisiana?

A. I know, there are a lot of things that people thought.

Q. Well, that isn't true, you haven't been in the penitentiary?

A. I been to a house of correction.

Q. You weren't in the penitentiary for three years? [fol. 29] A. No, sir.

Q. How long were you there?

A. Eight months.

Q. Why did you tell Mr. Sexton you were there approximately three years?

A. I told him—when I came in his office my head was swimming. I couldn't see out of my eye. You see, I'm black under my eyes. He asked me had I been in and I told him I been in a house of correction eight months.

Q. All right. You didn't tell Mr. Sexton that you had not robbed Mr. Myers, did you?

A. I told it at first, but Mr. Thompson said "You just as well say you did, or we will get it out of you".

Q. Right in the presence of Mr. Sexton?

A. Mr. Sexton was there, but he was called off to talk to two ladies who was outside in the lobby.

Q. I'm talking about when you gave the statement, did you tell him you robbed Mr. Myers?

A. No, sir, I didn't.

Q. Why did he put it in this statement?

A. You ask me something I can't tell you.

Q. He was in on the framing?

A. I'm deaf. I can't hear only out of my left side.

Q. Can you hear me?

A. I can hear pretty good.

Q. Why do you say Mr. Sexton was framing you? [fol. 30] Would you like to tell us?

A. I can't say how he came in, but it was somehow in the deal.

Q. Who was trying to frame you?

A. It looks like Mr. Hop Williamson and Thompson.

Q. Why?

A. When they come there to beat me up and told me I wouldn't get justice.

Q. I said why?

A. I don't know the reason why.

Q. Don't you think that's peculiar, that these men would just pick out a stranger and try to frame him?

A. I wasn't a stranger. I worked at Consolidated Steel as a pipefitter for a year and a half.

Q. Have you ever seen Mr. Hop Williamson?

A. Yes, sir, several times.

Q. Can you think of any reason why they would frame you?

A. Well, I don't know what else you would call it, they come and beat me up in Louisiana, without a license.

Q. You are not answering my question. Will you tell us why these two men, why would they beat you up? What reason would they have for beating you up?

A. I don't know the reason.

Q. You can't give the jury any reason?

A. No, sir. I was just by myself, and they figured [fol. 31] they could lay it off on me as well as anybody else. I was in Vidor, with this money. I had $235.00 in my own pocket, and was buying beer—

Q. But they didn't pick you up in Vidor. Hop Williamson and Mr. Thompson didn't see you there.

A. I picked up two salesmen and carried them to Buna. When I come back, that's when I stopped to get something to drink.

Q. Do you take this amatol all the time?

A. Yes, sir.

Q. And why is that?

A. It's a nerve medicine. I have moods.

Q. Where do you get it?

A. The doctor prescribes it.

Q. You have to get them on a prescription?

A. Yes.

Q. Where did you get those you had?

A. Dr. A. L. Douglas.

Q. What were you doing in Vidor?

A. I just stopped when I come back, to get a bottle of beer. And I had some rum.

Q. Stopped in Vidor, from where?

A. I was coming to Orange, and I wanted to go to DeQuincy where my mother lives.

Q. How were you going to get there?

A. I had a car.

[fol. 32] Q. Where did you leave from that night?

A. This man where I stayed, Mr. Joiner—

Q. I mean, where did you come from to Vidor?

A I left Dequincy, I was to get some stuff for my mother. I stopped at my Aunt's and they had some liquor, and I stopped at these other two places that had liquor, and I was drinking. When I came back, I stopped at this place and there is where I was lit up. I had a good bit on my mind; I had $235.00—

Q. You had that much money?

A. Yes, indeed, I had that much money.

Q. What did you do with Mr. Myers glasses?

A. I never had any glasses.

Q. What did you do with the coupon books?

A. I didn't see them. I wasn't—don't know anything about a coupon book.

Q. You say you didn't see him in Vidor that night?

A. I never seen the man in my life.

Q. Why did you get him in your car?

A. Listen to me, I'm telling the truth, and God knows I'm tell the truth. I never seen him when I passed out at that table.

Q. If you didn't see him and he didn't get in your car, this young boy, Robert Marshall, is just mistaken when he says he saw Mr. Myers get in the car with you?

A. That's right.

[fol. 33] Q. He was mistaken. And Mr. Myers was mistaken when he looked you in the eye and said "You are the man that robbed me and assaulted me"?

A. He is mistaken.

Q. But you are right?

A. I'm just as right about what I know about it.

Q. Now, but you say Mr. Williamson and Mr. Thompson just framed you because you were the only man around Vidor they could pin it on? Is that your idea?

A. Well, when they knocked you around and beat you up and tell you you have to say you did it, what else are you going to think?

Q. You say you have some witnesses to that?

A. I have one to when Thompson was making that threat.

Q. You were placed in jail some twelve to fifteen hours after this happened, weren't you?

A. I was put in at 5:00 on Sunday morning.

Q. Sunday morning of what day?

A. It was in January. I think it was on the 15th or 16th of January.

Q. Are you sure it was the 15th or 16th of January and not the 15th or 16th of February?

A. Well, it was along in there somewhere. I think it was the 15th or 16th.

Q. Would you say it was February of January? We say it was February, when do you say it was?

[fol. 34] A. February.

Q. All right. You will agree with us on that, that you were placed in jail on the 15th or 16th of February of this year, is that right?

A. I can tell you I've been here ever since the arrest. I mean, the 14th or 15th of this month, I figure I've been in jail six months.

Q. Well, that would place you being arrested in January, which you weren't.

A. This court was in session when they brought me in.

Q. February is when it was.

A. That's when it was.

Q. All right, and you have been in jail ever since then?

A. Yes.

Q. What has kept you from getting these witnesses you've told us about?

A. I ain't seen any people to get them over here. My mother is sick. Besides that, I don't have a father that I can depend on.

Q. Can't you tell the sheriff to serve subpoenas on the witnesses? Can you ask the county?

A. I got some letters—I wrote to my sister and my mother.

Q. They didn't receive them?

A. Nobody knows if the mail got out.

[fol. 35] Q. They are not interested enough to come over here and look after you?

A. She's not able.

Q. You don't have anybody interested enough in you to come over?

A. My mother does.

Q. You were brought over here the last term of court, and you were ready to plead guilty?

A. I wasn't ready to plead guilty.

Q. You didn't tell the sheriff, Standfield, that you wanted to plead guilty?

A. No, sir.

Q. You didn't tell Deputy York you wanted to plead guilty?

A. No, sir.

Q. But then you changed your mind?

A. No, sir.

Q. Do you know why Hop Williamson and Mr. Thompson arrested you that night?

A. I don't know the reason. I know they come in Louisiana and arrested me. I don't know the reason.

Q. Why do you think they came to Louisiana to get you?

A. I don't know the reason for what they done, when they run up behind and shot at the back of my car and rode up and grabbed me and beat me over the head out [fol. 36] on the Louisiana highway.

Q. You were driving hard to get out of this County—

A. No, I was coming back this way.

Q. What were you going to do when you got back?

A. I was going back to this bar—

Q. Oh, I thought you were going home?

A. I had been home. I wanted to go to get something to drink.

Q. You were almost out, but you wanted to get something to drink?

A. Yes, I might have got lit up, but I wanted something to drink.

Q. And you don't know the reason why Williamson and Thompson was looking for you?

A. They didn't say nothing, they run up and as soon as my car—I stopped, they jerked me out and beat me up and over the head, out in the highway.

Q. Do you think it was right for a young man like you to take an old 59-year-old man and beat him out, put a bunch of scars on his face, take his money and hit him? But the officers has to get a little bit rough with you and you don't think that's right, is that the ticket?

A. No, they don't have the right to do me like that.

Q. They did you like they should have done you.

A. No, they shouldn't have beat me and stomped me in the police station.

Q. Why?

[fol. 37] A. Because they shouldn't. Not while I was still in Louisiana, and get me and stomp me.

Q. I guess you think you did what you should have done to Mr. Myers?

A. I didn't do it.

Q. Suppose you had—would you have said it was right to do it?

A. I never done it.

Q. What kind of treatment would you be in favor of giving a man that would beat Old Man Myers up as he said he was beaten up?

A. All I can say, I didn't do it.

Q. You are not answering my question.

A. That is all I care to say.

Q. What kind of treatment would you be in favor of for such a man?

A. I wouldn't be in favor of beating him up like a dog, like they done me. I begged for mercy.

Q. You think they gave you mercy?

A. No.

Q. Just like you meted out to Mr. Myers, or would have to anybody else?

A. I didn't do anybody like that.

Q. You only mean to testify you didn't?

A. That's right.

Q. And you are the only man that has testified you [fol. 38] didn't. What this young man by the name of Robert Marshall says, he says Mr. Myers got in the car with you?

A. He is wrong.

Q. Mr. Myers testified "That is the man that robbed me and beat me up", and you gave a statement to Mr. Bill Sexton that you are the man that did it.

A. They—I had to do it.

Q. They found some gas ration tickets?

A. I didn't see them.

Q. And Mr. Myers glasses on your person.

A. I didn't see them.

Q. So how are you going to make anybody believe you didn't do it?

A. I didn't see his things.

Q. I believe you said you called Mr. Sexton's attention to some marks on your stomach?

A. Yes, and I showed him the rupture they gave me.

Q. Did you call Mr. Sexton's attention to that?

A. I told him. He seen the way my eyes was beat up, I asked for a doctor.

Q. Did you ever ask Sheriff Stanfield or Deputy York to subpoena any witnesses for you?

A. They wouldn't see that a thing was done. Mr. Standfield was gone up—somewheres.

Q. You don't have any friends at all?

A. I have friends.

[fol. 39] Q. Where are they? In Louisiana? None of them are here.

A. No, I don't have them right here. I couldn't make a call, anyway.

Q. You haven't had time since February 15th?

A. I've been sick; I tried to get a doctor to do something for me, and I couldn't even get a doctor.

Q. You could write some letters?

A. I couldn't get them sent.

Q. You mean the officers wouldn't mail them?

A. I don't know the reason; I know they never did go.

MR. FISHER: That's all.

BY THE COURT: All right, do you want to get any other witnesses?

BY THE DEFENDANT: That is all I have to offer.

DEFENSE RESTS

LOUIS YORK, a witness called by the State in rebuttal, having been first duly sworn, upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. FISHER:

Q. You are a deputy sheriff, are you not?

A. That's right.

Q. And you work for Dick Stanfield, sheriff of Orange County?

A: Yes, sir.

[fol. 40] Q. Did you ever fail to mail any letters that have been given you by the inmates of the jail?

A. I have not.

Q. Has this defendant James Bushnell ever given you any mail to mail, any letters?

A. Seems to me like I mailed some letters—in fact, I took out of my pocket to send some telegrams for him.

Q. Did he ever give you a list of names to subpoena as witnesses?

A. Not that I know of, no.

Q. Do you remember the last term of Court, he offered himself as wanting to plead guilty?

A. He did.

MR. FISHER: That's all.

BY THE COURT: Any questions?

BY THE DEFENDANT: Yes.

CROSS EXAMINATION

BY THE DEFENDANT:

Q. You say you sent some telegrams for me?

A. Yes, I did.

Q. You sent two when I first got here?

A. Yes.

Q. To my sister and one to my mother?

A. That is right.

Q. But you never mailed any letters?

A. If they was brought down, I mailed them.

[fol. 41] Q. You didn't send any letters?

A. Seems like Mr. Wise brought them down.

Q. You didn't mail any?

A. He brought them to me. That's my business.

Q. My mother never received them.

A. Well, I wouldn't know why they didn't get them.

BY THE COURT: Is that all?

BY THE DEFENDANT: Yes.

(Witness excused.)

W. P. SEXTON, a witness recalled by the State on rebuttal, having been previously sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. FISHER:

Q. Mr. Sexton, when you were taking the statement from the defendant, did he show you any marks or injuries on his back which he had suffered in any way by being hit?

A. No, sir.

Q. By the constable Williamson, or Mr. Thompson?

A. No, sir.

MR. FISHER: That's all.

CROSS EXAMINATION

BY THE DEFENDANT:

Q. When they brought me into your office to sign that, I asked about a doctor?

A. You didn't ask me anything about a doctor.

[fol. 42] Q. I asked you personally when I was sitting in front of you, and my nose and eyes was bleeding, and you said "You'll get a doctor whenever it's time".

A. I didn't say anything like that.

BY THE DEFENDANT: That's all.

(Witness excused.)

HOP WILLIAMSON, a witness called by the State on rebuttal, having heretofore testified, upon his oath testified further as follows:

DIRECT EXAMINATION

BY MR. FISHER:

Q. Mr. Williamson, I want to ask you one question: Did you or any other deputy frame this defendant?

A. No, sir.

Q. Why were you looking for him that night?

A. Because I had the information on him that he was the man that robbed Mr. Myers.

Q. Why did you go across over the State line?

A. Because I run him—jumped him over at the railroad tracks and run him across?

Q. What do you mean, you "jumped him"?

A. Well, he come by and we took out after him.

Q. Was he hard to catch, Mr. Williamson?

A. He gave us a good race, Mr. Fisher.

Q. What is the custom as to where he was in Louisiana and as to you as a Texas officer in apprehending people [fol. 43] who have violated a law in Texas? What advice or what instructions do Texas officers afford to Louisiana officers?

A. When we was already trying to find him, get him located, we asked an officer over there, and he said if he run into him, he would run him across the line in Vinton or Deridder, and he said he would follow him and back us up. And when I caught him, I asked him then if he wanted to go there and let them run him across or come on back; and he said "I'll come on back".

Q. What happened when he came back?

A. We carried him to the police station. They was helping us trying to stop him at the hotel, and we brought him back to the police station. We got to keep him there, ate dinner there, and about three or four o'clock, they took me off then.

Q. Did you or officer Thompson put these scars on his body?

A. No, sir.

Q. Did you hit him or beat him in any way to make those scars?

A. No, he told me about he had been shook up in the Army and he was taking Amatol tablets for relief.

MR. FISHER: I believe that's all.

CROSS EXAMINATION

BY THE DEFENDANT:

Q. When you realized that you arrested me over there, [fol. 44] you threw me out of the car again in Louisiana?

A. No.

Q. Put me in a '41 Buick that belong to this other guy that run me down first and beat me and stomped me,

then you got me in your car and brought me to jail and finished the business there?

A. The man was Lee Anderson and he runs a grocery store.

Q. The man I'm talking about is Henry Thompson, and he's a tinhorn gambler.

BY THE DEFENDANT: That's all.

(Witness excused.)

MR. FISHER: That's all for the State:

(Case concluded.)

[fol. 45] REPORTER'S CERTIFICATE

THE STATE OF TEXAS
COUNTY OF ORANGE

I, Winona Gibson, Official Court Reporter in and for the 128th Judicial District of Texas, Orange County, Texas, do hereby certify that I received the shorthand notes in a cause styled and numbered 4496, The State of Texas vs. James M. Bushnell, 1st Judicial District of Texas, from the present Presiding Judge of said District, the Honorable O'Neal Bacon, by United States mail, with his directions that I prepare a Statement of Facts from the notes of the late Leroy Alvis, Official Court Reporter for said 1st Judicial District.

I further certify that the above and foregoing 44 pages of typewritten matter constitute a transcript of such notes, true and correct to the best of my ability; and further, that the facts stated in the opening paragraph of this Statement of Facts are as reflected in said notes.

WITNESS MY HAND at Orange, Texas, this 10th day of September, 1960.

/s/ Winona Gibson
WINONA GIBSON, Official Court Reporter in and for the 128th Judicial District of Texas, Orange, County, Texas

[fol. 46] IN THE
128th DISTRICT COURT OF ORANGE COUNTY

CERTIFICATE OF CLERK AS TO COUNSEL—NOV. 9, 1959

THE STATE OF TEXAS
COUNTY OF ORANGE

This is to certify that in Cause No. 4496 entitled State of Texas Vs. James M. Bushnell, charged in the Indictment with Robbery by Assault, The defendant James M. Bushnell, according to the records in the office of the District Clerk of Orange County, Texas, had no attorney to represent him in the trial of this Cause, which trial took place on June 5th, 1944.

GIVEN under my hand and seal of the District Court of Orange County, at office in Orange, Texas, this 9th day of November, A.D. 1959.

/s/ Mrs. T. M. Dodd, Clerk
of the District Court of Orange
County, Orange, Texas.

[fol. 47] IN THE
128th DISTRICT COURT OF ORANGE COUNTY

VERDICT—June 5th 1944

We the Jury in the Case, the State vs JAMES M BUSHNELL. Deft find the defendant guilty as charged in the indictment and assess his punishment at 35 years confinement in State *the* penitentary

RAYMOND LAVERGE
Foremen of Jury.

THE STATE OF TEXAS
COUNTY OF ORANGE

I, Mrs. T. M. Dodd, Clerk of the District Court in and for said County and State, do hereby certify that the above and foregoing is a true and correct copy of the Verdict in Cause No. 4496 entitled THE STATE OF TEXAS vs. JAMES M. BUSHNELL as the same appears in my office.

Given under my hand and the seal of said Court, at my office in Orange, Texas, on this the 29th day of May, A. D. 1959.

/s/ Mrs. T. M. Dodd
MRS T. M. DODD, Clerk,
District Court, Orange County, Texas.

By ..... Deputy

[fol. 48] IN THE
128th DISTRICT COURT OF ORANGE COUNTY

JUDGMENT AND SENTENCE

BE IT REMEMBERED, That on Monday, the 29th day of May, 1944, there came on and was held a regular term of the District Court of Orange County, Texas, at the Court House thereof, at Orange, Texas.

Present and presiding: Hon. F. P. Adams, Judge, District Court of Orange County; Joe J. Fisher, District Attorney; T. M. Dodd, District Clerk, and L. G. Stanfield, Sheriff.

No. 4496

THE STATE OF TEXAS

vs.

JAMES M. BUSHNELL

June 5th 1944
Indicted for Robbery by Assault

THIS DAY this cause was called for trial, and the State appeared by her District Attorney, and the Defendant James M. Bushnell appeared in person announced ready for trial; and the Defendant in open Court pleaded not guilty to the charge contained in the Indictment herein; and thereupon a jury, to-wit: Raymond LaVergne and eleven others, was duly selected, empaneled and sworn, according to law, who, having heard the indictment read, and the defendant's plea of not guilty thereto; and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer, the Defendant being present, and in due form of law returned in to open Court the following verdict, which was received by the Court, and is here now entered upon the minutes of this Court, to-wit: We the jury in the case the State Vs. James M. Bushnell Defendant find the defendant guilty as charged in the indictment and assess his punishment at 35 years confinement in the State Penitentiary

RAYMOND LAVERGNE
Foreman of jury

It is, therefore, considered and adjudged by the Court that the Defendant James M. Bushnell is guilty of the offense of Robbery by Assault as found by the jury, and that he be punished, as has been determined, by confinement in the State Penitentiary for 35 years, and that the State of Texas do have and recover of the said Defendant James M. Bushnell all costs in the prosecution expended, for which execution will issue, and that the said Defendant be remanded to jail to await the further order of this Court herein.

No.

THE STATE OF TEXAS

vs.

day of 19

Order New Trial

ON THIS DAY came on to be heard the motion of the Defendant to set aside the verdict and judgment herein rendered and grant him a new trial of this cause, and the State being present in Court by her County Attorney, and the Defendant being present in Court in person, and the Court having heard the said motion and the evidence thereon submitted, is of the opinion that the same should be . It is therefore considered, ordered and adjudged by the Court that the said motion for a new trial herein be and the same is

No. 4496

THE STATE OF TEXAS

vs.

JAMES M. BUSHNELL

June 20th 1944

THIS DAY this cause being again called; the State appeared by her District Attorney, and the Defendant James M. Bushnell was brought into open Court in person,

in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him on 23rd day of this term. And thereupon the Defendant James M. Bushnell was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant James M. Bushnell to pronounce sentence against him as follows, to-wit: "It is the order of the Court that the Defendant James M. Bushnell who has been adjudged to be guilty of Robbery by Assault, whose punishment has been assessed by the verdict of the jury at confinement in the State Penitentiary for Thirty Five years, be delivered by the Sheriff of Orange County, Texas, immediately to the Superintendent of the Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and said James M. Bushnell shall be confined in said Penitentiary for Not less than Five no more than Thirty Five years, in accordance with the provisions of the law governing the Penitentiaries of said State."

And the said James M. Bushnell is remanded to jail until said Sheriff can obey the directions of this sentence.

F. P. Adams, Judge,
District Court, Orange County, Texas.

CLERK'S CERTIFICATE

THE STATE OF TEXAS)
COUNTY OF ORANGE)

I, Mrs. T. M. DODD, Clerk of the District Court in and for Orange County, Texas, do hereby certify that the above and foregoing is a true and correct copy of Judgment and Sentence in Cause No. 4496, styled The State of Texas vs. James M. Bushnell as same appears of record in Vol. E page 52 of the Criminal Minutes of the District Court of Orange County, Texas.

Given under my hand and seal of the District Court of Orange County, at office in Orange County, Texas, this 29th day of May, A. D. 1959.

/s/ Mrs. T. M. Dodd
(SEAL) MRS. T. M. DODD
Clerk District Court, Orange County, Texas.

[fols. 49-50] * * * *

[fol. 51]

IN THE
COURT OF CRIMINAL APPEALS
TRAVIS COUNTY, AUSTIN, TEXAS

EX PARTE

JAMES M. BUSHNELL, PETITIONER

VS.

O. B. ELLIS, Director, Texas Department of Corrections, Huntsville, Texas, RESPONDENT

PETITION FOR THE WRIT OF HABEAS CORPUS
APPLICATION NO. .....

PETITION FOR THE WRIT OF HABEAS CORPUS:

To the Presiding Judge of the above stated Court:

Comes now James M. Bushnell, hereinafter styled Petitioner, complaining of O. B. Ellis hereinafter styled Respondent, and with leave of the Court first had and obtained files this his petition for the writ of habeas corpus, and for cause of this action Petitioner would respectfully show the following facts .... to-wit:

That Petitioner is illegally and unlawfully restrained in his liberty by said Respondent by virtue of a certain committment based upon the judgment of a conviction entered by the Honorable F. P. Adams, judge presiding, 128th Judicial District Court in and for Orange County, Texas. Said judgment is void and violating of the Texas constitution and violative of the 6th and 14th amendments to the Constitution of the United States as more particularly set forth and complained of herein.

JURISDICTION

Jurisdiction of this honorable court is invoked pursuant to Art. 119 V.R.C.C.P. Acts 1943, 4th Leg., page 354, ch. 233 S.L., to review the judgment of the 128th Judicial District Court in Cause No. 4496 and to order Petitioner discharged from any further illegal and any unlawful imprisonment.

Statement of the Case:

A duly elected, empaneled, and sworn Grand Jury in and for Orange County, Texas, returned in and to the 128th Judicial District Court of said county, during the January Term A.D. 1944 a bill of indictment charging [fol. 52] Petitioner with the serious charge of robbery by assault.

On June 5th, A.D. 1944 Petitioner was called on to plead to the charge and upon calling of the case for trial, Petitioner stated to the Court that he had no attorney, was to poor to employ counsel, was unable to defend himself, and asked the Court to appoint counsel to defend him. Said request was denied; following the denial thereof a jury was empaneled and sworn, seated in the jury box and the trial commenced. Petitioner was, by the jury, found guilty as charged and punishment was assessed at 35 years in prison.

Exhibits:

Attached hereto and made a part hereof are photostatic copies of the indictment, judgment, sentence, jury verdict, and an affidavit of the clerk of the 128th District Court of Orange County, Texas.

Question Presented

Whether due process of law was violated as guaranteed by the 14th amendment to the Constitution of the United States in that Petitioner was forced to trial, in a Texas State Court for a serious charge of robbery . . . . a criminal offense, without the Court appointing counsel to represent him and protect his rights, and Petitioner being an indigent person with a sixth grade education, not being familiar with, or skilled, nor trained, in the science of law, and unable to defend himself adequately in any court room for any charge.

Arguments

Article I, Section 10, Bill of Rights of Constitution of Texas: "An accused may be represented by counsel, himself, or both."

Article I, Section 19, Texas Constitution: "No citizen of the State shall be deprived of life, liberty, property, privilege, or immunities, or in any manner disfranchised except by the due course of the law of the land."

Texas Manuel of Reversible Errors, Section 91, reads as follows: "A defendant is entitled to the advice and assistance of (counsel) a court appointed attorney to waive the statutory right of two days after indictment to prepare his case for trial."

In the case of Ex Parte Epperson, 153 A.R. 578, 223 S.W. 2d 790; and Parsons v. State, 153 A.R. 157, 218 S.W. 2d 202, the Court said: "The necessity for furnishing counsel to accused on trial for a crime less than capital [fol. 53] depends upon facts of each case including gravity of the crime, age and education of the accused, conduct of the prosecuting officers, nature of the offense charged, and the possible defense thereto."

At the time of Petitioners trial he was forced to trial without counsel. Petitioner being 22 years old, and his education was limited to six years, there can be no doubt but what an advantage was taken of Petitioner by the arbitrary denial of the assistance of counsel.

In Tompkins v. Missouri, 323 U.S. 485 the Court said: "It is the duty of the Court whether requested or not to assign counsel for him as a necessary requisite of due process of law. One must be assigned to him if he is unable to employ one and incapable of making his own defense."

Petitioner contends the failure of the trial judge to appoint counsel to represent him denied him due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Petitioner contends he had a constitutional right to counsel. It stems directly from the Fourteenth Amendment. See Wade v. Mayo, 334 U.S. 672.

Sixth Amendment of the United States Constitution provides in part: "And to have the assistance of counsel for his defense."

Tompkins v. Missouri, supra. "The accused must be advised of his right to counsel and a request for counsel is not necessary."

Petitioner did not waive his right to counsel. If the accused is not represented by counsel, and has not competently and intelligently waived his constitutional rights, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. 303 U.S. 629.

Petitioner had only a sixth grade education, not skilled, nor trained, in the science of law and was therefore unable to adequately defend himself and in open court asserted his right to counsel by stating to the Court that he was too poor to employ counsel and was not able to adequately and properly defend himself.

What then does a hearing include? Historically and in practice, in our country at least, it has always included the right to the assistance of counsel when desired and provided by the party asserting the right. Even the intelligent and edecuated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable generally of determining for himself whether [fol. 54] the indictment is good or bad; he is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he doesn't know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the illiterate, or those of feeble intellect? If in any case, civil or criminal, a State or Federal Court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore of due process of law in the constitutional sense. See Powell v. Alabama, 287 U.S. 68, 69; Chandler v. Fretag, 348 U.S. 3, 99 L. Ed. 4.

Petitioner being forced to trial without appointment of counsel, and his incapability of representing himself adequately, resulted in him being taken advantage of.

Absence of counsel when aggravated by circumstances showing that it resulted in Petitioner being taken advantage of or prejudiced violates due process of law which is guaranteed by the 14th and 6th Amendments to the Constitution of the United States. See Townsend v. Burke, 68 U.S. 1252.

Petitioner proves his constitutional rights were violated by the Court in that no counsel was appointed to represent him, and further, Petitioner was taken advantage of because he was not skilled in the science of law and not familiar with court room procedure so as to adequately and properly defend himself.

Convictions cannot stand if the accused stood trial without benefit of counsel and yet was so unskilled, so ignorant of the law and its procedure, or so mentally deficient as not to be able to comprehend the legal issues involved in his defense. See Williams v. Kiser, 323 U.S. 471; Wade v. Mayo, 334 U.S. 672; Palmer v. Ash, 342 U.S. 134. The requirement of the 14th Amendment is for a fair trial. See Betts v. Bradt, 316 U.S. 4. , 462.

Petitioner respectfully moves this honorable Court issue the writ of habeas corpus, under the authority of Article 119 V.A.C.C.P., forthwith and instanter, directed against O. B. Ellis, Texas Department of Corrections, the Respondent herein named.

[fol. 55]* PRAYER

Wherefore Petitioner prays this honorable Court issue its most gracious writ of habeas corpus, or order to show cause, directed to the Respondent herein named commanding him to appear in this Court on a day certain to be therein named and produce the body of Petitioner to the end that he may have an opportunity to prove the issues of fact controlling the constitutional validity of his detention.

That upon a final hearing thereof that an order be issued discharging your Petitioner from any further illegal imprisonment and restraint, all for which Petitioner ever prays.

Respectfully submitted

/s/ James M. Bushnell
Petitioner Pro Se
Box 32, Sec. Unit
Huntsville, Texas

Sworn to and subscribed before me this 5th day of Jan. A.D. 1960.

/s/ R. W. Burkett
(SEAL) Notary Public in and for
Walker County, Texas

[fol. 55-A]

COURT OF
CRIMINAL APPEALS OF TEXAS
Clerk's Office

NOTICE OF DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS

Austin, Texas 1-15-60

Dear Sir:

This is to advise that the Court has today denied without written order the Petition for writ of habeas corpus in Application No. 93, James M. Bushnell.

Sincerely yours,

(init) G. H.
GLENN HAYNES, Clerk

[fol. 56] IN THE
COURT OF CRIMINAL APPEALS
TRAVIS COUNTY, AUSTIN, TEXAS

JAMES M. BUSHNELL, PETITIONER

versus

O. B. ELLIS, Director, Texas Department of Corrections, Huntsville, Texas, RESPONDENT

PETITION FOR REHEARING ACTION NO. 93

To the Presiding Judge of the above stated Court:
And may it please the Court:

Comes now, James M. Bushnell, Petitioner in the above styled and numbered cause and respectfully petitions this Court for a rehearing in the above cause. Petitioner moves the Court reverse, vacate, and set aside the order of January 15, 1960, and in turn grant the petition for habeas corpus in the above cause, for the following reasons to-wit:

Petitioner has presented to this Court the properly drawn petition for habeas corpus and the allegations therein are well founded and supported by the judgment of the Trial Court which shows on its face that Petitioner had no attorney at his trial and in further support of the Petition, attached thereto, is a affidavit of the District Court Clerk stating the records of her indicate that Petitioner had no attorney.

Petitioner has brought himself within the rule by allegations in the petition alleging that Petitioner was mentally incompetent to present a defense to the serious offense with which he was charged to come further within the rule, a confession taken during a period of illegal detention, and such confession being extracted by coercion and duress at the hands of Orange County officers, such confession was admitted in evidence by the State of Texas at the trial of Petitioner. Further, Petitioner was never taken before a magistrate as is required by Art. 217 V.A.C.C.P., and as injury arising therefrom, said con-

fession was extracted by physical abuse of Petitioner, [fol. 57] such abuse being administered by the Orange County police officers. Further, Petitioner was arrested without a warrant for the offense of drunk driving and upon being placed in jail Petitioner was questioned about the robbery of one gambler of Orange County, Texas. Petitioner denied any knowledge of any robbery, and the injured party was called upon to identify Petitioner. Upon a face to face meeting of Petitioner and the injured party, Petitioner could not be positively identified, thereupon, the physical abuse was imposed upon Petitioner, and thus the confession, used as evidence by the State of Texas, was extracted from Petitioner.

Therefore, had Petitioner been afforded the constitutional right of assistance to counsel he could have presented the following defenses: Arrest without a warrant for the offense charged; no positive identification; a valid objection could have been made to the admission of the confession as evidence, as such confession being taken during a period of illegal detention; force and physical abuse being imposed by police authorities to extract such confession; not being at the scene of the crime. All of the above mentioned defenses, in order to be properly presented, would most certainly require the assistance of counsel. Petitioner is now squarely within the rule that requires appointment of counsel in non-capital cases.

The Supreme Court of the United States in the cases of Williams v. Kaiser, 323 U.S. 471, 473-474, and House v. Mayo, 324 U.S. 42, and in White v. Ragen, 324 U.S. 760 at page 763 thereof held that, where petitions were denied without requiring the Respondent to answer the Supreme Court of the United States would assume the allegations to be true. Such an assumption will no doubt be made in Petitioners case upon application for certiorari filed with the United States Supreme Court; such application will be filed upon the denial of this petition for rehearing, and attached to such application will be exhibits that are attached to the petition for habeas corpus filed in this Court; such exhibits present and show that Petitioner had no counsel and such exhibits not only make out a prima facie case but support the petition to the extent that the same should be granted.

When this Court will not recognize the judgment of the Trial Court, which judgment supports the allegations made by Petitioner, and denies a petition without first satisfying the Court that the allegations as made are not well not founded, then this Court extends the constitutional deprivation that has been claimed to the extent [fol. 58] that this Court will not, and does not, extend the constitutional right to due of law as conferred by the Constitution of the United States.

For the reasons so stated Petitioner prays the court grant this petition for rehearing and in turn grant the writ of habeas corpus, and Petitioner ever prays.

s/ James M. Bushnell
Petitioner

Sworn to and subscribed before me this 22nd day of Jan. A.D. 1961.

/s/ R. W. Burkett
(SEAL) Notary Public in and for
Walker County, Texas

[fol. 59]

COURT OF
CRIMINAL APPEALS OF TEXAS
Clerk's Office

NOTICE OF DENIAL OF MOTION FOR REHEARING

Austin, Texas, 2-16-20

Dear Sir:

This is to advise that the Court has today denied without written order the Relator's Motion for Rehearing in Application No. 93, James M. Bushnell.

Sincerely yours,

(init) G. H.
GLENN HAYNES, Clerk

[fol. 60]

SUPREME COURT OF THE UNITED STATES

No. 16 Misc., October Term, 1960

JAMES M. BUSHNELL, PETITIONER

vs.

O. B. ELLIS, Director, Texas Department of Corrections

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—Dec. 5, 1960

ON PETITION FOR WRIT OF CERTIORARI to the Court of Criminal Appeals of the State of Texas.

ON CONSIDERATION of the motion for leave to proceed in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 561 and placed on the summary calendar.

December 5, 1960.

U. S. GOVERNMENT PRINTING OFFICE 1961 961157 964

[fol. 61] IN THE
DISTRICT COURT OF ORANGE COUNTY, TEXAS

MAY TERM, A. D. 1944.

No. 4496

THE STATE OF TEXAS

vs.

JAMES M. BUSHNELL

INSTRUCTIONS TO THE JURY

GENTLEMEN OF THE JURY:

The defendant, James M. Bushnell, stands charged by indictment with the offense of robbery by putting in fear of life or bodily injury of one H. L. Myers, alleged to have been committed in the County of Orange and State of Texas, on or about the 12th day of February, A. D. 1944.

To this charge the defendant has plead not guilty.

You are the exclusive judges of the facts proved, the weight of the evidence and the credibility of the witnesses; but the law you will receive from the Court contained in these written instructions and be governed thereby.

The defendant is presumed to be innocent until his guilt is established by legal and competent evidence to the satisfaction of the minds of the jury beyond a reasonable doubt. The burden of this proof is upon the State, and if, upon a consideration of the whole case, taking into consideration all the facts and circumstances in evidence, you have a reasonable doubt as to the defendant's guilt, you will find him not guilty.

In deliberating upon this case you are instructed not to refer to or discuss any matter or issue not in evidence before you; neither shall you separate from each other nor talk with anyone not of your jury.

Our statutes provide that if any person by assault or by putting in fear of life, or bodily injury, shall fraudulently take from the person or possession of another any property with the intent to appropriate the same to his own use and benefit, he shall be punished by confinement in the penitentiary for life, or for a term of years not less than five years.

The use of any unlawful violence upon the person of another with intent to injure the other person, whatever be the means or degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with an ability to commit a battery, is an assault.

By the expression "coupled with an ability to commit a battery" is meant that the person making the assault must at the time be in such position and within such distance of the person assaulted to enable him to commit a battery on such person by the means used.

Now, bearing in mind the foregoing instructions, if from the evidence you believe beyond a reasonable doubt that the defendant, James M. Bushnell, on or about the 12th day of February, A. D. 1944, in the County of Orange and State of Texas, as alleged in the indictment, did unlawfully in and upon H. L. Myers make an assault, and did then and there by said assault, or by putting the said H. L. Myers in fear of life or bodily injury, fraudulently and against the will of the said H. L. Myers, take from the person or possession of the said H. L. Myers without his consent Two Hundred Dollars in money, and with the intent then and there to deprive the said H. L. Myers of the value of the same, and to appropriate the same to the [fol. 62] use and benefit of him, the said James M. Bushnell, then you will find the defendant guilty and assess his punishment at confinement in the penitentiary for life or for any term of years not less than five years.

You are further instructed that unless you believe from the evidence beyond a reasonable doubt that prior to the time the defendant made and signed the written statement introduced in evidence, if he did, that he, the defendant

was properly warned by the officer to whom said statement was made, first, that he did not have to make any statement at all, and second, that any statement made by him, the defendant, may and could be used in evidence against him on a trial for the offense concerning which it was made, and after being so warned, he voluntarily and without coercion, persuasion, inducement or promise of immunity of any kind, made the statement introduced in evidence, and unless you so believe, or if you have a reasonable doubt thereof, you will disregard such statement for any and all purposes and all parts thereof and consider the same for no purpose.

If you should find that the defendant, James M. Bushnell, did not rob H. L. Myers at the time and place alleged in the indictment, or if you have a reasonable doubt thereof, you will find the defendant, James M. Bushnell, not guilty.

If upon a consideration of the whole case you have a reasonable doubt as to the guilt of the defendant, you will find him not guilty.

Your verdict must be in writing and signed by your foreman.

s/ F. P. Adams
Judge Presiding.

* * * *

FILE COPY

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JAMES R. BROWNING, Clerk

PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 561.

JAMES M. BUSHNELL,

Petitioner

vs.

O. B. ELLIS, Director, Texas Department of Corrections,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

Paul D. Wright
[illegible]
[illegible]
[illegible]

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The State court's conviction of Petitioner on the charge of robbery by assault, after the court's refusal or failure to appoint defense counsel, deprived Petitioner of due process of law because he was unable to protect himself at trial in view of his youth and ignorance, the conduct of the court and the prosecuting attorney, and complex problems as to the admissibility and purpose of evidence 26

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 561

JAMES M. BUSHNELL,

Petitioner,

vs.

O. B. ELLIS, Director, Texas Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

Opinion Below

The Court of Criminal Appeals of Texas denied Petitioner's petition for writ of habeas corpus and motion for rehearing without written order or opinion (R. 44, 47).

Jurisdiction

Petitioner's petition for writ of habeas corpus was denied by the Court of Criminal Appeals of Texas on January 15, 1960 (R. 44). Motion for rehearing was denied by that Court on February 16, 1960 (R. 47). Petition for writ of certiorari was filed on February 25, 1960, and on

December 5, 1960 was granted with leave to proceed *in forma pauperis*. The jurisdiction of this Court rests on 28 U. S. C. 1257(3).

Question Presented

Whether a young, ignorant and indigent defendant is deprived of due process of law in violation of the Fourteenth Amendment to the United States Constitution when he is put to trial on a felony charge in a State court, without counsel, and is convicted after the court did not exclude various inadmissible and prejudicial evidence, including an involuntary written confession, and did not limit the jury's consideration of evidence of a prior conviction for another offense.

Constitutional Provision and Statutes Involved

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1257, Title 28, United States Code provides in pertinent part:

> "§1257. State courts; appeal; certiorari
>
> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • •

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Section 2106, Title 28, United States Code provides:

"§2106. Determination

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Article 1408, Title XVII, Vernon's Penal Code of Texas provides:

"Art. 1408. Robbery

"If any person by assault, or violence, or by putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary for life, or for a term of not less than five years; and when a firearm or other deadly weapon is used or exhibited in the commission of the offense, the punishment shall be death or be confinement in the penitentiary for any term not less than five years."

Article 215, Title 5, Chapter 1, Vernon's Code of Criminal Procedure of Texas provides:

"Art. 215. When felony has been committed

"Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.'

Article 217, Title 5, Chapter 1 (Arrest Without Warrant), Vernon's Code of Criminal Procedure of Texas provides:

"Art. 217. Must take offender before magistrate

"In each case enumerated in this chapter, the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate where the arrest was made without an order."

Article 245, Title 5, Chapter 3, Vernon's Code of Criminal Procedure of Texas provides:

"Art. 245. Examining trial

"When the accused has been brought before a magistrate, that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel."

Article 247, Title 5, Chapter 3, Vernon's Texas Code of Criminal Procedure provides:

"Art. 247. Warning to accused

"Before the examination of the witnesses, the magistrate shall inform the accused that it is his right to

make a statement relative to the accusation brought against him, but at the same time shall also inform him that he can not be compelled to make any statement whatever, and that if he does make such statement, it may be used in evidence against him."

Article 248, Title 5, Chapter 3, Vernon's Code of Criminal Procedure of Texas provides:

"Art. 248. Voluntary statement

"If the accused desires to make a voluntary statement, he may do so before the examination of any witness, but not afterward. His statement shall be reduced to writing by or under the direction of the magistrate, or by the accused or his counsel, and shall be signed by the accused by affixing his name or mark, but shall not be sworn to by him. The magistrate shall attest by his own certificate and signature to the execution and signing of the statement."

Article 491, Title 7, Chapter 4, Vernon's Code of Criminal Procedure of Texas provides:

"Art. 491. No arraignment

"There shall be no arraignment of a defendant except upon an indictment for a capital offense."

Article 494, Title 7, Chapter 4, Vernon's Code of Criminal Procedure of Texas, as in effect in 1944, provided:

"Art. 494. Court shall appoint counsel

"When the accused is brought into court for the purpose of being arraigned, if it appear that he has no counsel and is too poor to employ counsel, the court shall appoint one or more practicing attorneys to defend him. The counsel so appointed shall have at least one day to prepare for trial."

Article 494, Vernon's Code of Criminal Procedure of Texas, as amended effective June 1, 1959, provides:

"Art. 494. Court shall appoint counsel

"Whenever it is made known to the court at an arraignment or any other time that an accused charged with a felony is too poor to employ a counsel, the court shall appoint one (1) or more practicing attorneys to defend him.

"The counsel so appointed shall have ten (10) days to prepare for trial, unless such time be waived in writing by said attorneys and the accused."

Article 727, Title 8, Chapter 7, Vernon's Code of Criminal Procedure of Texas, provides:

"Art. 727. When confession shall not be used

"The confession shall not be used if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of accused, taken before an examining court in accordance with law, or be made in writing and signed by him; which written statement shall show that he has been warned by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made; or, unless in connection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed. If the defendant is unable to write his name, and signs the statement by making his mark, such statement shall

not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness."

Section 1, Louisiana Acts 1936, No. 284, now Louisiana Revised Statutes 15:84.1 (1950), Code of Criminal Procedure, provides in relevant part:

"Section 1. Be it enacted by the Legislature of Louisiana, That any member of a duly organized State, county or municipal peace unit of another State of the United States who enters this State in close pursuit, and continues within this State in such close pursuit, of a person in order to arrest him on the grounds that he has committed a felony in such other State, shall have the same authority to arrest and hold in custody such person, as member of a duly organized State, parish or municipal peace unit of this State have, to arrest and hold in custody a person on the ground that he has committed a felony in this State."

Section 2, Louisiana Acts 1936, No. 284, now Louisiana Revised Statutes 15:84.2 (1950), Code of Criminal Procedure, provides:

"Section 2. That if an arrest is made in this State by an officer of another State in accordance with the provisions of Section 1 of this Act, he shall, without unnecessary delay, take the person arrested before a magistrate of the parish in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful, he shall commit the person arrested to await, for a reasonable time, the issuance of an extradition warrant by the Governor of this State. If the magistrate determines that the arrest was unlawful, he shall discharge the person arrested."

Section 1, Article 60, Louisiana Acts 1928, No. 2, now Louisiana Revised Statutes 15:60 (1950), Code of Criminal Procedure, provides:

"§60. Arrest without warrant, when permitted

"Any peace officer may, without a warrant, arrest a person:

* * * * * *

"(2) When such person has committed a felony although not in the presence of the officer;

"(3) When a felony in fact has been committed and he has reasonable cause to believe that such person has committed it;

"(4) When he has reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person has committed it; * * *"

Statement

I.

The Proceedings in the Texas District Court.

A. The Indictment

On February 22, 1944, a grand jury of the District Court of Orange County, Texas, indicted Bushnell for robbery by assault (R. 1-2). The indictment charged that on or about February 12, 1944, Bushnell, by assault upon and violence to H. L. Myers, and by putting Myers in fear of life and bodily injury, took $200.00 from him (R. 1).

B. The Trial

1. *The Plea*

Bushnell pleaded not guilty (R. 35).

2. *The Lack of Representation of Defendant*

At trial Bushnell was not represented by an attorney (R. 33) and acted as counsel for himself (R. 3). He cross-examined four of the six witnesses for the State (R. 9, 10, 12-13, 17, 18, 29, 30, 31-32). He did not object to any questions asked by the prosecution or to any evidence introduced.

The court reporter recorded the trial proceedings only during the examination of witnesses. The trial record or statement of facts is silent as to whether Bushnell examined the veniremen on *voir dire*, or exercised peremptory challenges, or objected to the instructions to the jury. Any colloquy between the court and the defendant prior to the testimony of witnesses, or in connection with the formulation of the charge to the jury, was not reported. The trial record does not reflect whether Bushnell requested the appointment of counsel, or was informed by the court whether or not he had a right to counsel, or was offered court-appointed counsel. Neither Bushnell nor the court mentioned the matter of defense counsel during the reported proceedings (R. 3-32).

Petitioner, in his petition for writ of habeas corpus in the Court of Criminal Appeals of Texas, alleged that upon calling of the case for trial, he stated to the court that he had no attorney, was too poor to employ counsel, was not familiar with law, and was unable to adequately defend himself (R. 40, 42). He also alleged that he asked the court to appoint counsel to defend him, that such request was denied, and that he did not waive his right to counsel (R. 40, 42).

3. *The Circumstances of Defendant at the Trial*

In his petition for writ of habeas corpus in the Court of Criminal Appeals of Texas, Petitioner alleged that when

tried he was 22 years old and had only a sixth-grade education (R. 41, 42). Petitioner was actually 25 years of age at the time of trial, and the age shown in such petition was apparently a typographical error. At trial the prosecuting witness twice spoke of Bushnell as a "boy" (R. 6), and the district attorney called Bushnell "a young man" (R. 26). The constable who arrested Bushnell testified for the State that Bushnell had said that "he had been shook up in the Army and he was taking Amatol tablets for relief" (R. 31). Bushnell testified on cross-examination that he had been granted a medical discharge from the Army (R. 21), and was taking Amatol "all the time" upon a doctor's prescription, because "It's a nerve medicine. I have moods" (R. 23). The constable also testified that he took whatever money was on the defendant at the time of arrest (R. 12). A deputy sheriff testified for the State that he paid for some telegrams sent by Bushnell from jail (R. 29). Bushnell testified on cross-examination that his mother was sick and not able to come to the trial and that "I don't have a father I can depend on" (R. 25), and that he had no friends at the trial (R. 28). The district attorney asked Bushnell if he had been put in jail shortly after his arrest and had been there continuously until trial, and Bushnell affirmed that he had been (R. 24-25).

4. *The Evidence as to the Alleged Offense*

The State's evidence was a signed statement, including a confession, by Bushnell (R. 16-17), and the testimony of six persons, including four local law enforcement officers. Bushnell was the only defense witness (R. 19-28).

a. *A. L. Myers*

Myers, the prosecuting witness, testified on direct examination (R. 4-10) substantially that: On or about February 12, 1944, when he was going to buy lumber, his

car gave out and slipped into a ditch. He walked into a beer tavern at Vidor, Texas, and got two boys, one of whom was Robert Marshall, to pull him out. Outside the tavern a man, identified by Myers as the defendant, asked whether Myers was alone and other questions, and said to get in defendant's car, that defendant would carry him to get a mechanic. Myers got in the car, alone with Bushnell. Instead of going toward Orange, Bushnell turned down another road. Bushnell gave a drink to Myers, who, in a minute began to feel numb and knew he "was doped". Bushnell got a six-shooter, started to stop but went further, then stopped and ordered Myers out. Myers got out; Bushnell cursed him, held the gun on him, and hit him, cutting him to the bone and in three places, leaving scars over his eyes and on his nose. Bushnell threatened to shoot a bullet through Myers' brain and took "everything" from Myers, including about $210 from Myers' billfold, his gas ration tickets and his eyeglasses. Myers stayed in a ditch about 2 or 2½ hours, walked 3½ miles until he was found by a constable, and "might near bled to death". Myers positively identified Bushnell as the man who robbed and assaulted him.

Myers was asked and testified on direct examination as follows:

> A. * * * So they got after him then, asked me his description and I described him and they caught him. He taken about $210.00. I had one $100 bill and the other in $50s; I might have had one $5. They got back $128.00, and he said he spent the other in a gambling dump.
>
> Q. That's Bushnell?
>
> A. Yes, sir (R. 6-7).
>
> * * * * *
>
> Q. You say he took some other possessions?

A. Yes, he taken all my ration books, every ration book I had. We got the A cards, they was on him, and my eyeglasses. He even taken my eyeglasses and hid them, stuck them in the cushion of his car. They got my eyeglasses and A cards, also. * * * (R. 7).

* * * * *

Q. I believe you stated that the officer later returned your gas ration book?

A. Yes, sir, the A. They got them off of him and part of the money.

Q. And some of your money?

A. Some of my money, and my eyeglasses (R. 9).

b. *Clyde (Hop) Williamson*

Williamson, a prosecution witness, was a constable of Orange County, Texas, at the time of the alleged offense and at the time of trial (R. 10-11). On direct examination he was asked the following questions to which he gave the following answers:

A. There was a couple of boys come to me and told me that there was a fellow that picked up Mr. Myers.

Q. Do you know whose those boys were?

A. Robert Marshall, and Stephens.

Q. Is Robert Marshall here?

A. Yes.

Q. Do you know where Stephens is?

A. He is in the army.

Q. All right.

A. So they said that they saw him with a gun and said he turned off the wrong way to get him home, and said "Hop, you better look and see about it: it don't look right". So I got to hunting him. * * * (R. 11).

Williamson testified that on the road he found Myers, who was "all beat up", "dirty and bloody and didn't have his good sense, hardly", and that Myers told Williamson what had happened (R. 11). Williamson testified he started looking for Bushnell, ran him to Louisiana and caught him, then brought him back and searched him (R. 12). He testified that he got from Bushnell money, and gas coupons and glasses which were given back to Myers (R. 12). On redirect examination Williamson was asked and answered as follows:

> Q. Why were you looking for him that night?
>
> A. Because I had the information on him that he was the man that robbed Mr. Myers (R. 31).

c. *Robert Marshall*

On direct examination Marshall testified for the State substantially as follows: He and a boy friend, Kenneth Stevens, were in a beer parlor in Vidor, where Myers asked them to pull his car out of the ditch, and they pulled him out. Bushnell had been inside and had come out and got in a car. Myers was drinking a beer and went over to Bushnell's car and left with him. Marshall identified Bushnell as the man that Myers left with (R. 13-14). Marshall also was asked and testified as follows:

> Q. All right, what did you do then?
>
> A. Kenneth said "I don't believe he was taking him home; let's go and tell Hop to watch and see where he went." * * * (R. 14).

d. *H. L. Standfield*

Standfield, sheriff of Orange County (R. 19) and a witness for the State, was asked and testified on direct examination as follows:

Q. Do you know anything about a pocketbook belonging to Mr. Myers?

A. Well, there was a deputy from—I believe it was Kountze, rang me and said he had found it, with some—and that two boys had brought it to him and said they found it between Terry and Connell.

Q. And that was a pocketbook that was identified as belonging to Mr. Myers?

A. That's right (R. 19).

c. *Defendant Bushnell*

While cross-examining Myers, Bushnell denied that he robbed or had ever seen Myers (R. 9) or that he had ever owned a gun (R. 10), and testified that on the night of the robbery he was "delirious", "passed out" and "was taking medicine", and that he remembered nothing about it (R. 9).

On direct examination Bushnell testified that on the night of the alleged robbery he was in the tavern at Vidor, drank rum and beer, took some "femotal", remembered nothing thereafter, and woke up in his car "over there by Louisiana" (R. 19-20). He testified that he then drove to Lake Charles, Louisiana, had breakfast there, and was arrested when coming back home to DeQuincy, Louisiana (R. 20).

On cross-examination, Bushnell repeatedly said under persistent questioning that he was not guilty (R. 21, 24, 27). He again said he "passed out in that place" (R. 21). He stated several times that he was framed (R. 21, 22, 24) and that he had never seen Myers (R. 21, 24). He stated that he did not beat Myers (R. 21, 27), did not take money from him (R. 21) or his glasses or ration books (R. 24, 27, 28), did not get Myers into Bushnell's car (R. 21, 24, 27), and did not give him liquor with amatol (R. 21). Bushnell denied that he had told county attorney Sexton that he

robbed Myers (R. 22); and denied that after arrest he had said that he wanted to plead guilty (R. 26).

f. *Louis York*

York, a deputy sheriff of Orange County (R. 28-29) and a rebuttal witness for the State, was asked and testified for the State, with respect to Bushnell:

> Q. Do you remember the last term of Court, he offered himself as wanting to plead guilty?
>
> A. He did (R. 29).

g. *The Written Statement by Bushnell*

During the State's case in chief, W. P. Sexton, County Attorney of Orange County at the time of trial and at the time of the alleged offense (R. 15), testified that he took a statement from Bushnell (R. 15-16), which was introduced as State's Exhibit No. 1 (R. 16). The statement is as follows (R. 16-17):

> "I, James M. Bushnell, being in the custody of Hop Williamson, Constable of Precinct No. Four, Orange County, Texas, and having been warned by W. P. Sexton, the person to whom the hereinafter set out statement is by me made, that I do not have to make any statement at all, and that any statement made by me may be used in evidence against me on the trial for the offense concerning which this statement is made, do here make the following voluntary statement in writing to the said W. P. Sexton, to wit:
>
> "My name is James M. Bushnell and I am twenty-five years of age. On the night of February 12, 1944, I was at Vidor, Texas, at a beer joint. While at this beer joint I drank quite a bit of rum and beer and took some amatol tablets. I then left the place and a man whose name I do not know got in the car with me. I rode down a side-road from Highway #90 approx-

imately three miles. I then robbed this man and took what money he had on his person from him, which was approximately $200.00 in currency. During the robbery I hit him with a beer bottle and struck him with my fists. I then put him out of the car and then drove to Orange, Texas; I was arrested just across the Sabine River Bridge by Mr. Hop Williamson and Mr. I. W. Thompson. I returned from Louisiana voluntarily with Mr. Hop Williamson. I was convicted in the State of Louisiana for swindling with worthless checks approximately three years ago and served a term in the Louisiana State Penitentiary.

"I make this confession voluntarily and I was not coerced or threatened by Mr. Williamson or Mr. Thompson or by Mr. Sexton, the County Attorney, in the making of this statement. The same is true in every respect and I realize that by the making of this voluntary statement that the same can be used against me on my trial. Witness my hand this 14th day of February, 1944.

/s/ James M. Bushnell"

5. *The Oral Testimony as to Whether Bushnell's Signed Confession Was Voluntary*

The alleged robbery of Myers occurred on the night of Saturday, February 12, 1944 (R. 1, 4, 7, 8, 19), at about 10:30 P.M. or midnight (R. 8, 9). Constable Williamson testified that he found Myers about 4:00 or 4:30 thereafter and then started looking for Bushnell (R. 11). The constable went to several places where Bushnell had stayed, and near a hotel by the depot saw Bushnell and "run" him to Louisiana "until we caught him" (R. 12). When asked by the district attorney whether he was jailed some 12 or 15 hours after the robbery, Bushnell testified without contradiction that he was put in at 5 A.M. on Sunday

(R. 24), February 13, 1944. Bushnell's confession was signed on the following day, February 14 (R. 17).

Bushnell testified that constable Williamson and an officer Thompson arrested him in Louisiana (R. 20, 26) after they shot at the back of his car (R. 26), and this was not disputed. Petitioner asserted four times that the constable jerked him out of the car on a Louisiana highway and beat him over the head (R. 13, 20, 26). Although the constable testified that "I never touched you over there" in Louisiana (R. 12), the State did not attempt to show that Bushnell was not jerked from his car and beaten in Louisiana by someone. When the constable was asked by Bushnell whether the constable, at the time of the arrest, put Bushnell in a car that belonged "to this other guy that run me down first and beat me and stomped me" and later put Bushnell in the constable's own car, the witness admitted that "The man was Lee Anderson and he owns a grocery store" (R. 31-32). The constable had previously testified that "They was helping us trying to stop him at the hotel, and we brought him back" (R. 31).

The constable testified that he had arranged for a Louisiana officer to "run" Bushnell across the State line, and that such officer "said he would follow him and back us up" (R. 31). The constable testified that when he caught Bushnell, he asked Bushnell if he wanted to let the Louisiana officer "run him across or come on back, and he said, 'I'll come on back'" (R. 31). The constable testified that he took Petitioner to the police station at Orange when he came back (R. 31) and put him in jail (R. 12).

Petitioner testified twice that at the police station the constable and officer Thompson tried to get him to confess and beat and stomped him on the floor (R. 20, 27). He testified: "I was beat worse than a dog: then when they got through beating, they taken me in an office and sat me

in a chair and knocked me down. He said 'I'm going to slap you—I'd like to kill you, but I want to do it the right way.' He knocked me out twice and when they got through knocking me around, they threw some water on me, and then they threw me down the stairs" (R. 20). None of such testimony was denied. The constable admitted using force against Petitioner at some time; when asked by Petitioner whether "you beat me up across in Louisiana", the constable testified "I never touched you over there" and "I ain't touched you but once" (R. 12-13). When asked by Bushnell if he "beat me up without mercy", the constable answered, "It wasn't over in Louisiana" (R. 12, 13). After the constable so testified on cross-examination, the State excused the witness (R. 13). When the constable was recalled on rebuttal, the district attorney did not ask him whether he or anyone else beat or stomped Bushnell but asked him only whether he or Thompson "put these scars on his body" or "hit him or beat him in any way to make those scars", to which the constable answered in the negative (R. 31).

It was undisputed that Bushnell was taken to the office of the county attorney, Mr. Sexton, to make the signed statement (R. 18, 30). The county attorney, when asked if Bushnell then looked like he had been abused, answered, "He was—he had a bandage on his head, yes, sir" (R. 18). Bushnell testified without contradiction that at that time he could not see out of his eye (R. 18, 22), and that his nose and eyes were bleeding (R. 30). When Bushnell, attempting to cross-examine county attorney Sexton, stated that he was threatened in Sexton's office about the statement, and asked if that was right, the county attorney did not deny that a threat was made but evaded Bushnell's question by asking Bushnell, "You didn't tell me anything about it, did you?" (R. 17). When Bushnell then stated to the county attorney that the constable had threatened at that time to tie and cow-whip him, and asked the witness if that

was right, the county attorney did not deny it but said only, "I didn't hear that" (R. 17). The district attorney then asked the county attorney whether Bushnell told the county attorney at the time of the statement about being mistreated or abused or forced to make the statement (R. 18), but did not ask if Bushnell was threatened or forced to make it. On re-cross examination of Mr. Sexton when Bushnell said that in Mr. Sexton's office "they said I had to sign a statement, said that day if it wasn't signed, they would get it one way or the other", Mr. Sexton answered that "no such conversation as that took place" (R. 18). Bushnell testified on cross-examination that he first told the county attorney he did not rob Myers, but that officer Thompson then said "You just as well say you did, or we will get it out of you" (R. 22). Bushnell testified that at the time of such statement by Thompson, the county attorney "was there, but he was called off to talk to two ladies who was outside in the lobby" (R. 22). Bushnell repeated that he was told he had to say he did it (R. 24) and that he had to give the statement (R. 27). The State introduced no evidence, other than a confession itself, contradicting such testimony that he had to give the statement and was told that he had to, although the county attorney testified that Bushnell said that the statement was true (R. 18). Bushnell's testimony that he showed the county attorney a "rupture they gave me" and scars on his back and that he couldn't read at the time the statement was given, was denied by the county attorney (R. 15, 30).

The district attorney, when cross-examining Bushnell, assumed that he had been subjected to violence by the officers, and condoned it in the following interrogation (R. 26-27):

> Q. And you don't know the reason why Williamson and Thompson was looking for you?

A. They didn't say nothing, they run up and as soon as my car—I stopped, they jerked me out and beat me up, and over the head, out in the highway.

Q. Do you think it was right for a young man like you to take an old 59-year-old man and beat him out, put a bunch of scars on his face, take his money and hit him? But the officers has to get a little bit rough with you and you don't think that's right, is that the ticket?

A. No, they don't have the right to do me like that.

Q. They did you like they should have done you.

A. No, they shouldn't have beat me and stomped me in the police station.

Q. Why?

A. Because they shouldn't. Not while I was still in Louisiana, and get me and stomp me.

Q. I guess you think you did what you should have done to Mr. Myers?

A. I didn't do it.

Q. Suppose you had—would you have said it was right to do it?

A. I never done it.

Q. What kind of treatment would you be in favor of giving a man that would beat Old Man Myers up as he said he was beaten up?

A. All I can say, I didn't do it.

Q. You are not answering my question.

A. That is all I care to say.

Q. What kind of treatment would you be in favor of for such a man?

A. I wouldn't be in favor of beating him up like a dog, like they done me. I begged for mercy.

Q. You think they gave you mercy?

A. No.

Q. Just like you meted out to Mr. Myers, or would have to anybody else?

A. I didn't do anybody like that.

There is no suggestion in the record that any warrant for Bushnell's arrest had been issued, and Bushnell testified without contradiction that he was arrested "without a permit" (R. 20), "without a license" (R. 23). It is inferable from the trial record as a whole that prior to the time Bushnell signed the written statement, the officers did not take him before a magistrate for an examining trial.

6. *The Conduct of the Trial Judge*

When Bushnell was cross-examining Myers and attempted to testify himself, the court instructed defendant: "You may not testify. You can tell that when you take the stand" (R. 9); and again to "just ask questions" (R. 9); and again: "You can testify to that when you get on the stand" (R. 10). While Bushnell was cross-examining constable Williamson, the court said, "You can testify to that when your turn comes up" (R. 12). So far as is shown in the statement of facts, the court gave no other instructions nor any warning to Bushnell. The only assistance given Bushnell by the court was during cross-examination of county attorney Sexton, when the court directed the defendant to ask the witness whether he knew Bushnell was threatened in his office (R. 17). The court did not ask any question of any witness.

7. *The Cross-Examination of Bushnell as to Character and Reputation*

Bushnell was asked the following questions by the district attorney and gave the following answers, on cross-examination:

> Q. I thought you had been in the State Penitentiary for three years, in Louisiana?
>
> A. I know, there are a lot of things that people thought.

Q. Well, that isn't true, you haven't been in the penitentiary?

A. I been to a house of correction.

Q. You weren't in the penitentiary for three years?

A. No, sir.

Q. How long were you there?

A. Eight months.

Q. Why did you tell Mr. Sexton you were there approximately three years?

A. I told him—when I came in his office my head was swimming. I couldn't see out of my eye. You see, I'm black under my eyes. He asked me had I been in and I told him I been in a house of correction eight months (R. 21-22).

• • • • •

Q. Can't you tell the sheriff to serve subpoenas on the witnesses? Can you ask the county?

A. I got some letters—I wrote to my sister and my mother.

Q. They didn't receive them?

A. Nobody knows if the mail got out.

Q. They are not interested enough to come over here and look after you?

A. She's not able.

Q. You don't have anybody interested enough in you to come over?

A. My mother does (R. 25).

• • • • •

Q. You don't have any friends at all?

A. I have friends.

Q. Where are they? In Louisiana? None of them are here.

A. No, I don't have them right here. I couldn't make a call, anyway (R. 28).

8. *The Charge to the Jury*

The court's charge to the jury included the following instruction:

> "You are further instructed that unless you believe from the evidence beyond a reasonable doubt that prior to the time the defendant made and signed the written statement introduced in evidence, if he did, that he, the defendant, was properly warned by the officer to whom said statement was made, first, that he did not have to make any statement at all, and second, that any statement made by him, the defendant, may and could be used in evidence against him on a trial for the offense concerning which it was made, and after being so warned, he voluntarily and without coercion, persuasion, inducement or promise of immunity of any kind, made the statement introduced in evidence, and unless you so believe, or if you have a reasonable doubt thereof, you will disregard such statement for any and all purposes and all parts thereof and consider the same for no purpose" (R. 50-51).

No instruction was given with respect to the defendant's oral confessions introduced in the testimony of Myers and deputy sheriff York, or excluding any other evidence from consideration, or limiting consideration of the evidence of defendant's prior conviction to the issue of his credibility.

9. *The Verdict, Judgment and Sentence*

The Jury found Bushnell guilty and assessed his punishment as 35 years (R. 34). The court entered judgment on the verdict (R. 35-36), and imposed sentence of not less than 5 nor more than 35 years in the penitentiary (R. 37). No motion for new trial was made (R. 36), and no appeal was taken.

II.

The Petition for Writ of Habeas Corpus.

Petitioner collaterally attacked the judgment of the District Court by petition for the writ of habeas corpus in the Court of Criminal Appeals of Texas (R. 39-44). Petitioner there asserted that the judgment is void under the Constitution of Texas and the Sixth and Fourteenth Amendments to the United States Constitution (R. 39), but the only "question presented" to that Court was whether due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution was violated in that Petitioner was forced to trial without court-appointed counsel (R. 40). Petitioner stated that "being forced to trial without appointment of counsel, and his incapability of representing himself adequately, resulted in him being taken advantage of" (R. 43). Attached to the petition were copies of the indictment, jury verdict, judgment, sentence, and a certificate of the court clerk to the effect that Petitioner had no attorney at trial (R. 40).

In his "Petition for Rehearing" in that Court, Petitioner asserted that "a confession taken during a period of illegal detention, and . . . extracted by coercion and duress at the hands of Orange County officers" was admitted in evidence at his trial (R. 45). Petitioner stated that he was arrested without a warrant and was never taken before a magistrate as required by Article 217 of the Code of Criminal Procedure of Texas, and "as injury arising therefrom, said confession was extracted by physical abuse of Petitioner . . . administered by the Orange County police officers" (R. 45-46). Petitioner asserted that had he been afforded assistance of counsel, objection could have been made to the admission of the confession (R. 46).

After Petition for Writ of Certiorari was filed in this Court, the reporter's shorthand record of the proceedings at Petitioner's trial was transcribed (R. 32).

Summary of Argument

The record of the proceedings at Petitioner's trial on the serious charge of robbery by assault shows without dispute that Petitioner, an emotionally disturbed young man of 25, without funds or friends, was tried without the assistance of counsel, after having pleaded not guilty. His handicap of ignorance, in acting as his own counsel, was apparent throughout the trial. The district attorney improperly subjected Petitioner to humiliating interrogation to show that he was a merciless person of bad reputation, and the trial judge did not stop such questioning or otherwise materially assist or protect Petitioner. The State introduced in evidence a signed confession which Petitioner repudiated at the trial. Defense counsel could have successfully objected to such evidence on the ground that it had been coerced, in view of admissions at the trial that Petitioner had been physically abused and injured by peace officers trying to get the confession, and in view of Petitioner's uncontradicted testimony that he had been threatened by one of the same officers immediately before signing the confession. The court nevertheless permitted the jury to find that the confession was voluntary and to consider it as evidence. The State also introduced, and the jury was permitted to consider, inadmissible evidence of two oral confessions attributed to Petitioner and much other excludible hearsay testimony. Damaging evidence of a prior conviction of Petitioner should have been limited to the purpose of impeaching his credibility, but the court did not so limit it.

On this record Petitioner's conviction and sentence, entered by the Texas court after failure or refusal to ap-

point defense counsel, deprived Petitioner of due process of law and are void under the Fourteenth Amendment to the United States Constitution. Since the record conclusively establishes the material allegations of Petitioner's petition for the writ of habeas corpus, and no further development of the facts is necessary on remand, this Court should hold that Petitioner is entitled to the writ as prayed for in the Court of Criminal Appeals of Texas.

ARGUMENT

The State Court's Conviction of Petitioner on the Charge of Robbery by Assault, After the Court's Refusal or Failure to Appoint Defense Counsel, Deprived Petitioner of Due Process of Law Because He Was Unable to Protect Himself at Trial in View of His Youth and Ignorance, the Conduct of the Court and the Prosecuting Attorney, and Complex Problems as to the Admissibility and Purpose of Evidence.

Indicted for a grave offense, Petitioner was tried without the assistance of counsel, convicted, and sentenced to a severe term in prison. At trial, he was seriously prejudiced by the following errors which an attorney could have prevented:

a. *The court's charge to the jury permitted the jury to find that Petitioner's written confession was voluntary, and to consider it as evidence of guilt, when such confession should have been excluded on the undisputed facts.*

That Petitioner's signed confession (R. 16-17) was obtained by physical violence and threats is shown by undisputed evidence in the trial record, discussed in Paragraph I.B. 5 under "Statement", *supra.*

Petitioner's arrest in Louisiana, by a Texas county peace officer, was without a warrant (R. 20, 23, 26). Such arrest,

by the Texas officer acting as such, could have been lawful under Louisiana law only if Petitioner had committed a felony and was arrested after a close pursuit from Texas. Louisiana Laws 1936, No. 284, Sec. 1.[1] Assuming, *arguendo*, that Petitioner was lawfully arrested after close pursuit, as claimed in the arresting officer's testimony (R. 12, 31), Petitioner was entitled to be taken without unnecessary delay before a local Louisiana magistrate for examination and commitment to await extradition. Louisiana Laws 1936, No. 284, Sec. 2. If Petitioner in fact agreed to return with the Texas officer, as the officer claimed, and thereby waived his rights to an immediate hearing in Louisiana and to extradition, Petitioner did so after being beaten and when given the alternative of being "run across" to Texas by a Louisiana officer (R. 31-32).[2] After Petitioner was

[1] The Louisiana statute cited in the text gives an out-of-state peace officer in close pursuit the same authority as a Louisiana officer has to arrest "a person on the ground that he has committed a felony" in Louisiana. A Louisiana officer may arrest without a warrant on such ground when "such person has committed a felony although not in the presence of the officer". La. Acts, 1928, No. 2, Sec. 1, Art. 60(2). Under Texas law a county peace officer has no authority as such to make an arrest outside his county. See cases cited in *Ward* v. *Texas*, 316 U.S. 547, 552 (1942). Where the offense was not committed within his presence or within his view, a Texas county peace officer may make an arrest without a warrant only on satisfactory proof that a felony has been committed and that the offender is about to escape, so that there is no time to procure a warrant. Art. 215, Vernon's Code of Criminal Procedure of Texas.

[2] Even if Petitioner was unlawfully seized in Louisiana or unlawfully returned to Texas without extradition, this would not have been a defense to the prosecution. *Brooken* v. *State*, 26 Tex. App. 121, 9 S.W. 735 (1888); *cf. Ex parte Davis*, 51 Tex Cr. R. 608, 103 S.W. 891 (1907); *Pettibone* v. *Nichols*, 203 U.S. 192 (1906). Nor is it probable that under Texas law a coerced waiver of extradition without assistance of counsel would have been a defense to the prosecution or a ground for release of Petitioner. *Cf. Ex parte Harrelson*, 97 Okla. Cr. R. 399, 264 P.2d 1004 (1953); *In re Charles*, 344 P.2d 1118 (Okla. Cr. App. 1959). Unlawful arrest has never been recognized as a defense to a criminal prosecution in Texas. See Note, 56 A.L.R. 260 (1928).

returned to Texas, he was jailed and violently beaten (R. 12-13, 18, 20, 26-27). The officers failed to take him before a Texas magistrate on the day following, a Monday, as required by Article 217 of the Texas Code of Criminal Procedure, for an examining trial at which he could have made a voluntary statement, after being warned by the magistrate, as required by Articles 245 and 247 of the Code of Criminal Procedure, and under the safeguards imposed by Article 248 of that Code.[3] Instead, Petitioner was taken before the county attorney to sign a confession (R. 15-17). Although illegal acts of peace officers leading up to a confession "do not furnish the answer to the constitutional question", *Lisenba* v. *California*, 314 U.S. 219, 235 (1941), the failure of arresting officers to take the accused before an examining magistrate, as required by Article 217 of the Texas Code of Criminal Procedure, has been considered by this Court in determining whether a confession was forced. *Ward* v. *Texas*, 316 U.S. 547, 552 (1942); *cf. Payne* v. *Arkansas*, 356 U.S. 560, 567 (1958).

The brutal mistreatment of Petitioner was begun when he was apprehended, by a person who helped a constable run him down (R. 31-32), and was continued at the police station either on the same day or the following day, by the arresting constable and another peace officer who were trying to get a confession (R. 20, 27, 31-32). On the day after his arrest and upon being further threatened by the constable, Petitioner signed the confession (R. 17, 22), although he had first told the county attorney who took his statement that he did not commit the robbery (R. 22). Under these circumstances Petitioner's signed confession "was not free and voluntary but was the product of

[3] When an arrest is made on Sunday, Article 217 of the Code of Criminal Procedure does not require the arresting officer to take the accused before a magistrate until Monday. See *Gilbert* v. *State*, 162 Tex. Cr. R. 290, 284 S.W. 2d 906 (1955).

coercion and duress", for Petitioner "was no longer able freely to admit or deny or refuse to answer". *Ward* v. *Texas*, *supra*, 316 U.S. 547, 555 (1942).

The confession was properly excludable under decisions of this Court. *Brown* v. *Mississippi*, 297 U.S. 278 (1936); *Chambers* v. *Florida*, 309 U.S. 227 (1940); *Ward* v. *Texas*, *supra*, 316 U.S. 547 (1942). Under the principle reaffirmed in *Payne* v. *Arkansas*, *supra*, 356 U.S. 560, 568 (1958), Petitioner's signed confession could have been excluded on objection of counsel:

> "But where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."

The written confession was also inadmissible under Article 727 of the Code of Criminal Procedure of Texas, which requires that any confession be made "in the voluntary statement of accused". Under that Article, when an officer at the trial admits having struck the prisoner shortly before the confession, the confession is inadmissible over objection; the court is required, on request, to exclude from the jury's consideration any such confession which has been introduced; and submission to the jury of the issue of voluntariness is error. *Williams* v. *State*, 88 Tex. Cr. R. 87, 225 S.W. 177 (1920); *Thompson* v. *State*, 124 Tex. Cr. R. 440, 63 S.W. 2d 849 (1933); *Alston* v. *State*, 132 Tex. Cr. R. 130, 102 S.W. 2d 428 (1937); *Sigler* v. *State*, 139 Tex.

Cr. R. 167, 139 S.W. 2d 277 (1940); *Allgood* v. *State*, 141 Tex. Cr. R. 327, 148 S.W. 2d 433 (1941); *Vaughn* v. *State*, 145 Tex. Cr. R. 115, 166 S.W. 2d 139 (1942). Upon objection to the proffered confession as having been coerced, the court would have been required to hear, in the absence of the jury, the evidence relating to voluntariness and to make a preliminary determination of that issue. *Bingham* v. *State*, 97 Tex. Cr. R. 594, 262 S.W. 747 (1924); *Cavazos* v. *State*, 143 Tex. Cr. R. 564, 160 S.W. 2d 260 (1942); *Davis* v. *State*, 165 Tex. Cr. R. 456, 308 S.W. 2d 880 (1957).

The failure of the arresting officers to take Petitioner immediately before an examining magistrate, as required by Article 217 of the Texas Code of Criminal Procedure, would have raised an additional State ground for exclusion of the confession, *Vaughn* v. *State*, *supra*, if it had been established by Petitioner that such failure "caused or contributed to bring about the confession". See *Dimery* v. *State*, 156 Tex. Cr. R. 197, 240 S.W. 2d 293, 295 (1951); *Golemon* v. *State*, 157 Tex. Cr. R. 534, 247 S.W. 2d 119, 124 (1952).

b. *Excludable evidence of oral confessions by Petitioner was admitted.*

The rebuttal testimony of deputy sheriff York that defendant "offered himself as wanting to plead guilty" (R. 29), amounted to the introduction of an unwarned and unsigned confession of guilt made while defendant was under arrest. Under Article 727 of the Texas Code of Criminal Procedure, the admission of such confession over objection would have been reversible error. *Dean* v. *State*, 72 Tex. Cr. R. 247, 161 S.W. 974 (1913) (agreement to plead guilty, *held*, inadmissible); *Stafford* v. *State*, 125 Tex. Cr. R. 174, 67 S.W. 2d 285 (1934) (offer to plead guilty, *held*, inadmissible). If not admissible as original evidence, such

evidence was not admissible for impeachment. *Pierson* v. *State*, 145 Tex. Cr. R. 388, 168 S.W. 2d 256 (1943).

The testimony of prosecuting witness Myers, when asked about the recovery of part of his money, that defendant "said he spent the other in a gambling dump" (R. 6), was evidence of an unwarned and unsigned confession, made when in the custody of an officer or under arrest, and inadmissible under Article 727 of the Texas Code of Criminal Procedure. Its admission over objection would have been reversible error. *Cf. Willoughby* v. *State*, 87 Tex. Cr. R. 40, 219 S.W. 468 (1920); *Dennis* v. *State*, 141 Tex. Cr. R. 304, 148 S.W. 2d 1098 (1941); *Kunz* v. *State*, 166 Tex. Cr. R. 14, 310 S.W. 2d 583 (1958).

c. *The court failed to limit the jury's consideration of evidence of Petitioner's prior conviction to the purpose of impeaching his credibility, when such evidence was not admissible for any other purpose.*

The statement in Petitioner's written statement (State's Exhibit No. 1, R. 17) that he had been convicted in Louisiana for swindling with worthless checks and served a term in the Louisiana State Penitentiary, was not admissible at the stage of trial at which it was admitted, before Petitioner took the stand. After Petitioner testified, such evidence of prior conviction, together with Petitioner's oral testimony on cross-examination as to such prior imprisonment (R. 21-22), should have been limited to the purpose of impeaching his credibility. *Mahoney* v. *State*, 33 Tex. Cr. R. 388, 26 S.W. 622 (1894); *Sexton* v. *State*, 33 Tex. Cr. R. 416, 26 S.W. 833 (1894); *Hutton* v. *State*, 33 S.W. 969 (Tex. Cr. App. 1896); *Roberts* v. *State*, 44 Tex. Cr. R. 267, 70 S.W. 423 (1902); *Navarette* v. *State*, 103 Tex. Cr. R. 449, 281 S.W. 863 (1926). Petitioner was entitled to a charge that the jury could consider such evidence only

for such limited purpose, and the failure of the court to give such charge, whether or not requested, was reversible error. *Sexton* v. *State*, *supra*; *Hutton* v. *State*, *supra*. It could hardly have occurred to Petitioner not to take the stand, so as to preclude admission of evidence of his prior conviction, after the trial judge had repeatedly indicated to Petitioner that the time for his testimony would be when it came his turn to take the stand (R. 9, 10).

d. *The court failed to instruct the jury to disregard the evidence of Petitioner's character or reputation, or to reprimand the district attorney for opening up the matter, when Petitioner had not raised the issue of his character.*

Petitioner on cross-examination was subjected to humiliating interrogation which improperly raised the issue of his character and reputation. After Petitioner had testified that he begged for mercy from the peace officers, the prosecutor asked, "Just like you meted out to Mr. Myers, or would have to anybody else?" (R. 27). Petitioner was also asked what had kept him "from getting these witnesses you've told us about", and whether he had "anybody interested enough in you to come over" (R. 25), and "You don't have any friends at all?" "Where are they? In Louisiana? None of them are here" (R. 28). Such interrogation, when Petitioner had not placed his character or reputation in issue, was improper. The court on its own motion should have promptly reprimanded the district attorney for asking such questions and instructed the jury to disregard such questions and any evidence of character or reputation so obtained. Failure to do so was reversible error. *Childress* v. *State*, 92 Tex. Cr. R. 215, 241 S.W. 1029 (1922); *Day* v. *State*, 117 Tex. Cr. R. 173, 34 S.W. 2d 871 (1931); *cf. Pollard* v. *State*, 33 Tex. Cr. R. 197, 26 S.W. 70 (1894).

c. Much excludable hearsay evidence was admitted.

The testimony of Myers that his stolen ration book and eyeglasses "was on" Petitioner, and that the officer got them and money "off of" defendant or from his car (R. 7, 9) was hearsay, since it is inferable from the record that Myers was not present at the time of recovery of such articles and was testifying to information received from another. Although constable Williamson later testified that he recovered the articles from defendant, Myers' testimony on the matter could have been excluded. *Massie* v. *State*, 27 Tex. App. 577, 11 S.W. 638 (1889). Likewise inadmissible was Myers' hearsay testimony that his pocketbook was sent back to the sheriff's department from Longview (R. 7) and that an officer could tell of any connection the defendant had with anybody at Longview (R. 10). All of Sheriff Standfield's testimony, which related only to his conversation with an out-of-town deputy who said two boys had found Myers' pocketbook on a road, was inadmissible hearsay (R. 19). Such testimony tended to bolster the constable's testimony that defendant said he threw away the billfold (R. 12).

Other hearsay evidence to which objection could have been made was: the testimony of constable Williamson that the boys Marshall and Stevens had said to him, after Myers allegedly rode off with defendant, "you better look and see about it; it don't look right" (R. 11); the testimony of Marshall that Stevens, seeing Myers and defendant leave together, said, "I don't believe he was taking him home; let's go and tell Hop to watch and see where he went" (R. 14); and Williamson's statement that he was looking for defendant because "I had the information on him that he was the man that robbed Mr. Myers" (R. 30).

Petitioner denied that he committed or was present at the robbery, and did not raise any issue of temporary in-

sanity, although he testified that prior to the time of the alleged robbery, he had been drinking rum and beer and taking femotal, and had been delirious and passed out (R. 9, 19). It should be noted, in evaluating complexities of Texas law with respect to defenses which Petitioner conceivably might have raised, that under Article 36 of the Penal Code of Texas temporary insanity produced by voluntary recent use of liquor or narcotics or a combination thereof is not an excuse for an offense, but evidence of such temporary insanity may be introduced in mitigation of the penalty. See 1 Branch's Annotated Penal Code of Texas (2d ed. 1956) pp. 53-59. However, it seems a defendant is entitled to acquittal on a finding of temporary insanity resulting from the use of whisky mixed with a drug. *Parker* v. *State*, 91 Tex. Cr. R. 68, 238 S.W. 943 (1922); 12 *Tex. Jur.* pp. 300-301.

At Petitioner's trial the judge suggested to Petitioner one question to be asked of a witness (R. 17) but otherwise gave him no assistance. The court showed shocking unconcern for Petitioner's rights, allowing the district attorney to pursue improper lines of questioning that condoned the beatings inflicted on Petitioner (R. 26-27) and presented Petitioner to the jury as a merciless and friendless person (R. 25, 27, 28). The failure of the court to give Petitioner the protection to which he was entitled in the charge to the jury was inexcusable.

Petitioner when tried was 25 years old, but was younger than the petitioner in his thirties whose right to counsel in a non-capital felony case was held to have been denied in *Gibbs* v. *Burke*, 337 U.S. 773 (1949). Petitioner's immaturity, his condition as an emotionally disturbed person, and his ignorance of how to protect himself at trial, are apparent throughout the record.

In view of Petitioner's youth and ignorance, the indifference of the trial judge, the callous questioning by the

prosecutor, and the prejudicial consequences to Petitioner of being tried without the assistance of counsel, this case is controlled by the principle recently restated by this Court in *Cash* v. *Culver*, 358 U.S. 633, 637 (1959):

> "'Where the gravity of the crime and other factors —such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair,' the Constitution requires that the accused must have legal assistance at his trial. *Uveges* v. *Pennsylvania*, 335 U.S. 437, 441. Of particular relevance here are the decisions of the Court which have held the appointment of counsel necessary to a fair trial because of the complexity of the proceedings. *Rice* v. *Olson*, 324 U.S. 786; *Gibbs* v. *Burke*, 337 U.S. 773; and see *Williams* v. *Kaiser*, 323 U.S. 471, 475-476."

The Court of Criminal Appeals of Texas should have ordered a development of the facts alleged by Petitioner, as it did in *Ex parte Bush*, 166 Tex. Cr. R. 399, 313 S.W. 2d 287 (1958). That Court did not have before it the statement of facts (R. 3-32) or the jury charge (R. 49-51) which have been placed in the record since the filing in this Court of Petition for the Writ of Certiorari.

Upon review of habeas corpus cases involving a state court conviction, without defense counsel, of a non-capital felony, this Court, in cases where it had the full trial record before it and the petitioner's allegations were established by that record, has concluded that the conviction could not stand. *E.g.*: *Townsend* v. *Burke*, 334 U.S. 736 (1948); *Gibbs* v. *Burke*, *supra*. In other such cases, where the trial record was not before this Court, or the petitioner's

allegations required proof from outside the record, this Court has determined only that the petitioner was entitled to a hearing or opportunity to establish his claims. *E.g., Cash* v. *Culver, supra.* In the case at bar, the condition of the record before this Court enables the Court to determine that Petitioner is entitled to the writ of habeas corpus on remand.

The record before this Court establishes without dispute Petitioner's youth and ignorance at the trial, his indigence and inability to defend himself, and that he was taken advantage of. The only issues raised by Petitioner's allegations and not settled by the trial record are whether he requested and was denied counsel, and whether he waived court appointment of counsel.

Under the circumstances a request or demand for counsel, if made as Petitioner alleges, was unnecessary. In *Gibbs* v. *Burke, supra,* 337 U.S. 773 (1949), where petitioner had been convicted of a non-capital felony without having the assistance of counsel, the record showed neither a request for counsel by the petitioner nor an offer of counsel by the court, and the petitioner conducted his own defense. This Court stated that "a failure to request counsel does not constitute a waiver when the defendant does not know of his right to counsel", and held that the petitioner's constitutional right to a fair trial was denied. In this case, as in *Gibbs*, the conclusion is irresistible that Petitioner was too ignorant to know that he had a Federal right to counsel. Moreover, Respondent has conceded in this Court, in his Brief in Opposition to Petition for Writ of Certiorari (P. 5), that in view of the Texas law as it existed in 1944, it would have made no difference whether Petitioner requested the Court to appoint counsel:

> "Additionally, under the Texas Criminal Procedural Law in 1944 it made no difference whether or not Petitioner had asked the Trial Court to appoint counsel to

represent him, which is denied. Even had the record indicated such request, which it does not, Petitioner was being tried on a non-capital felony offense, which required no arraignment and no right to representation by counsel."

On the record now before this Court, it is clear that the Court of Criminal Appeals of Texas would not require further proof by Petitioner of his allegations that he requested counsel, was indigent and did not waive his Federal right to the appointment of counsel. In *Moore v. State*, 324 S.W. 2d 879, 880, 881 (Tex. Crim. App. 1959), that Court said:

"The record in this case affirmatively reflects that this appellant, an eighteen-year-old boy, was not represented by counsel either of his own choosing or by appointment by the court. There is an absence of any suggestion in this case that the trial court tendered or offered to appoint counsel for appellant, or that appellant was financially able to employ counsel. There is an absence of any evidence that appellant possessed sufficient education or was mentally alert to the point of being able to represent himself upon the trial of this case.

* * * * *

"Giving effect to the decisions of the Supreme Court of the United States and the rule of law announced therein, we are constrained to agree that under the facts here presented this conviction must be reversed, because of the failure on the part of the trial court to appoint counsel for the appellant.

"While we have no statute in this state which requires the appointment of counsel for one on trial for an ordinary felony, the Supreme Court of the United States in a series of decisions has judicially determined

and held that failure to appoint counsel for one on trial in a state court for an ordinary felony may constitute a denial of due process, under the Fourteenth Amendment to the Constitution of the United States."

The state of the record in the *Moore* case was emphasized by a dissenting opinion, 324 S.W. 2d at 881, 882, as follows:

"• • • There is nothing in this record to show that appellant used any diligence to secure counsel of his own selection earlier; nothing to show that he desired that the court appoint counsel for him • • •.

"The effect of the majority opinion is that, contrary to its prior decisions, this Court announces the rule to be that in all felony cases wherein the defendant is not represented by counsel his conviction will be set aside unless the record affirmatively shows that the defendant was financially able to employ counsel, and that he possessed sufficient education and mental alertness to the point of being able to represent himself upon the trial."

Further development of the facts by the Court of Criminal Appeals of Texas, before granting the writ of habeas corpus, thus becomes unnecessary.

Petitioner has exhausted his remedies in the courts of Texas, and Respondent so concedes in this Court. Brief of Respondent in Opposition to Petition for Writ of Certiorari, P. 2.*

---

* The Court of Criminal Appeals of Texas has held that an original petition to that Court for the writ of habeas corpus is a proper remedy to prevent enforcement of an unappealed judgment obtained under circumstances which constituted a denial of due process under the Federal Constitution. *Ex parte Bush*, 313 S.W. 2d 287, 166 Tex. Cr. R. 399 (1958) (non-capital felony conviction after denial of court appointed counsel to presumptively insane defendant, *held*, writ of habeas corpus granted ten years after conviction).

Conclusion

The Court of Criminal Appeals of Texas erred in refusing to give Petitioner an opportunity to establish the material allegations of his petition for writ of habeas corpus and in refusing to develop the facts and determine the issue raised by Petitioner as to denial of due process under the Fourteenth Amendment. Had the Court of Criminal Appeals considered the full record which is now before this Court, it would have been required, under this Court's decisions during the past twenty years, to grant Petitioner the writ of habeas corpus. The circumstances under which Petitioner went to trial, and the complexity of the legal problems which then arose, made it impossible for Petitioner to have a fair trial, without the assistance of counsel. This Court should now determine that Petitioner is entitled on the trial record to the writ of habeas corpus, and reverse and remand for further proceedings not inconsistent with the opinion of this Court.

Respectfully submitted,

PERCY D. WILLIAMS
Counsel for Petitioner
3100 Gulf Building
Houston 2, Texas

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PETITION NOT PRINTED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 561

JAMES M. BUSHNELL
Petitioner,

v.

O. B. ELLIS, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF FOR THE RESPONDENT

WILL WILSON
Attorney General of Texas
B. H. TIMMINS, JR.
Assistant Attorney General
of Texas
LINWARD SHIVERS
Assistant Attorney General
of Texas
Attorneys for Respondent
Capitol Station
Austin, Texas

Baldwin Printing Company, Inc., 309 West 8th Street, Austin, Texas

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On Writ of Certiorari to the Court of Criminal Appeals of Texas

---

BRIEF FOR THE RESPONDENT

OPINION BELOW

The Court of Criminal Appeals of Texas denied Petitioner's application for writ of habeas corpus and motion for rehearing without written order or opinion (R. 44-47).

JURISDICTION

Petitioner's application for writ of habeas corpus was denied by the Court of Criminal Appeals of Texas on January 15, 1960 (R. 44). Motion for rehearing was dismissed by the Court on February 16, 1960 (R. 47). Petition for writ of certiorari was filed on February 25, 1960, and on December 5, 1960, the Petitioner was granted leave to proceed *in forma pauperis*. Jurisdiction of this Court rests on 28 United States Code 1257(3).

QUESTIONS PRESENTED

I.

HAS PETITIONER EXHAUSTED HIS STATE REMEDIES WHEN HE RAISES QUESTIONS OF STATE PROCEDURE ALLEGING A DENIAL OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN SUCH QUESTIONS HAVE NOT BEEN RAISED ON APPEAL OR HABEAS CORPUS IN THE TEXAS COURT OF CRIMINAL APPEALS.

II.

DOES THIS PETITION, ON THE FACTS, HELP SUBVERT THE TRADITIONAL AND PROPER FUNCTION OF THE WRIT OF HABEAS CORPUS.

III.

DID THE TEXAS COURT OF CRIMINAL APPEALS RULE CORRECTLY IN DENYING HABEAS CORPUS AND IN FINDING THAT PETITIONER WAS NOT DEPRIVED OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY REASON OF PETITIONER REPRESENTING HIMSELF WHEN CHARGED IN A STATE COURT WITH A NON CAPITAL FELONY OFFENSE, INFORMED THE COURT THAT HE HAD NO ATTORNEY, FAILED TO REQUEST THE APPOINTMENT OF COUNSEL TO REPRESENT HIM, AND MADE NO MOTION FOR A CONTINUANCE FOR ANY REASON.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Fourteenth Amendment, Section 1, reads in part as follows:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Article 491, Vernon's Code of Criminal Procedure of Texas, provides:

> "There shall be no arraignment of a defendant except upon an indictment for a capital offense."

Article 494, Vernon's Code of Criminal Procedure of Texas, provided in 1944:

> "When the accused is brought into court for the purpose of being arraigned, if it appear that he has no counsel and is too poor to employ counsel, the court shall appoint one or more practicing attorneys to defend him. The counsel so appointed shall have at least one day to prepare for trial."

Article 1408, Title XVII, Vernon's Penal Code of Texas provides:

> "Art. 1408. Robbery
>
> "If any person by assault, or violence, or by putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary for life, or for a term of not less than five years; and when a firearm or other deadly weapon is used or exhibited in the commission of the offense, the punishment shall be death or by confinement in the penitentiary for any term not less than five years."

STATEMENT

Respondent does not think it necessary to set out in voluminous detail a repeatment of the statement contained in Petitioner's brief, but will confine his statement to a brief resume of the pertinent facts.

This is a criminal case in which the Petitioner was charged by indictment with the felony offense of rob-

bery by assult. Under Article 1408, Vernon's Penal Code of Texas, the punishment prescribed for this crime is confinement in the State penitentiary for life, or for a term of not less than five (5) years. This case, therefore, involves a non capital felony offense under Texas law. The case was tried before a jury in the District Court of Orange County, Texas, in June, 1944, resulting in Petitioner's conviction. Petitioner was sentenced to the State penitentiary for a term of thirty-five (35) years. During the course of the trial Petitioner represented himself, and the record is silent as to whether or not Petitioner ever made a request for a court appointed attorney. Petitioner was twenty-five (25) years of age at the time of the trial and had some six (6) years of formal education. The State's evidence consisted of a voluntary confession executed by Petitioner and the testimony of six (6) people, including four (4) local law enforcement officers.

Petitioner, after conviction and sentencing, did not perfect an appeal to the Court of Criminal Appeals of Texas. It was not until sixteen (16) years after his conviction that Petitioner attempted to raise the question of "denial of due process" by the State court for failing to appoint an attorney to represent him. Petitioner then collaterally attacked the judgment of the Orange County District Court by filing a petition for writ of habeas corpus in the Court of Criminal Appeals of Texas, which was subsequently denied along with a motion for rehearing. After Petitioner's application for a writ of habeas corpus was denied by the Court of Criminal Appeals, Petitioner then filed an application for writ of certiorari to the

Supreme Court of the United States, which was granted with leave to proceed *in forma pauperis*.

ARGUMENT

I.

PETITIONER HAS NOT EXHAUSTED HIS STATE REMEDIES WHEN HE RAISES QUESTIONS OF STATE PROCEDURE ALLEGING A DENIAL OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN SUCH QUESTIONS HAVE NOT BEEN RAISED ON APPEAL OR ON HABEAS CORPUS IN THE TEXAS COURT OF CRIMINAL APPEALS.

Petitioner has raised numerous questions of State procedural law in the Supreme Court of the United States which were not presented to the Court of Criminal Appeals of Texas in his application for writ of habeas corpus. Respondent contends that this honorable Court does not have jurisdiction to consider, and that Petitioner should be precluded from asserting questions that were not presented to the Texas Court of Criminal Appeals in the habeas corpus proceeding in January, 1960. Petitioner now attempts to raise new issues and to contend that his alleged arrest without a warrant, failure to speedily take him before a Magistrate, his being forced from Louisiana into Texas without his consent or without an extradition hearing, and the alleged coerced confession, were all a part of the pattern whereby

he was denied due process of law under the Fourteenth Amendment to the United States Constitution. Petitioner not only chose not to raise these points on habeas corpus in the State courts, but he did not even raise these questions in his application for writ of certiorari to this Court in February, 1960. He did mention on motion for rehearing in the Texas Court of Criminal Appeals that his confession was extorted, but this was dropped from the petition for writ of certiorari in this Court. Apparently, he did not think that these questions were meritorious or he would have asserted them earlier along with his allegations regarding counsel. The one and only question presented in this Court was the failure of the trial court to appoint counsel to represent Petitioner. Certiorari was granted by this Court on that one point and on no other.

It is Respondent's contention that Petitioner has not exhausted his State remedies as to these additional allegations. To have done so he must have raised them in the Texas Court of Criminal Appeals in his application for writ of habeas corpus. The Texas Court of Criminal Appeals had before it only a generalized assertion that Petitioner was tried without counsel and therefore denied due process of law. The State Court cannot fully evaluate the petition unless Petitioner is compelled to set out generally, in lay language, the particular way in which he feels the lack of counsel handicapped his defense. The Petitioner gave no hint to the State Court of any specific way in which he felt damaged by the lack of counsel.

Although Respondent views these grounds, as finally asserted, to be lacking in merit, we nonetheless hold to the view that the State courts should have had the opportunity to pass on questions of this nature to determine whether or not there had been denial of due process. In *Brown v. Allen*, 344 U.S. 443 (1953), the Supreme Court, at page 478, stated:

> "We have interpreted Section 2254 [United States Code, Annotated] as not requiring repetitious applications to state courts for collateral relief, page 447, supra, but clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. *A failure to use a state's available remedy, in the absence of some interference or incapacity . . . bars federal habeas corpus. The statute requires that the applicant exhaust available state remedies.*" (Emphasis added)

The Court went on to say:

> "The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal court. It is only authorized where a state prisoner is in custody in violation of the Constitution of the United States. 28 U. S. C., Section 2241. That fact is not to be tested by the use of habeas corpus in lieu of an appeal." [The Court citing Sunal v. Large, 332 U.S. 174, 180; Eagles v. Samuels, 329, U. S. 304, 311; In Re Yamashita, 327 U. S. 1, 8; Johnson v. Zerbst, 304 U. S. 458, 465; Goto v. Lane, 265 U. S. 393.] "To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime."

It is apparent from this language that the Supreme Court has adopted the view that Federal courts should not review questions raised in an application for writ of habeas corpus when such questions have not previously been raised by habeas corpus in the State courts. The Supreme Court requires that the State courts be given opportunity to pass on all such questions of denial of due process of law in the trial of one under the State law before such questions are reviewed by the Federal court. In the case at bar, Petitioner, in his application for writ of habeas corpus to the Court of Criminal Appeals, raised the sole question of denial of due process by failure of the court to appoint an attorney to represent him. Since all of these new points raised by Petitioner in his brief are aspects of State procedural law, and since Petitioner did not feel inclined to appeal his case after his conviction, nor were such points raised by habeas corpus in the State courts, all such points of error were *waived* at that time and certainly could not now be collaterally attacked by writ of habeas corpus to a Federal district court or on certiorari in this Court. It is well established that when a State provides a method for review of criminal cases and such review affords the opportunity for a high court to determine whether the accused was given a fair and just trial, if the accused chooses not to exhaust the State remedies afforded him, no subsequent complaint lies. A State procedural rule which forbids the raising of Federal questions at late stages in the case, or by any other than a prescribed method has been recognized as a valid exercise of State power. *Wil-*

liams v. Georgia, 349 U. S. 375, 382-383 (1955), and cases cited at N. 6, *Parker v. Illinois*, 333 U. S. 571 (1948). *Central Union Telephone Co. v. City of Edwardsville*, 269 U. S. 190 (1925).

Certainly, this Court is not precluded from considering points when the State court allows the Federal questions to be raised only at a late stage in the State proceeding as "an avoidance of the Federal issue." *Rogers v. Alabama*, 192 U.S. 226 (1904); *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939). Here, however, Petitioner was never precluded from raising the issues which he now attempts to raise in his brief on the merits. There has been no "avoidance of the Federal questions" by the State courts. Consequently, this Court should refrain from a consideration of these additional questions and adhere to the principle, which it has recognized, that Texas can validly require these issues to be raised on appeal or habeas corpus and not for the first time on motion for rehearing in the State habeas corpus proceeding. This Court has repeatedly held that a claim not asserted in a State court will not be considered on certiorari to the Supreme Court since under those circumstances there would not be a complete utilization of the processes made available to him by the convicting State. *Brown v. Allen*, *supra*. The failure to raise these questions in the State courts or in the petition here works an estoppel and the present afterthought should not revive the question. *Pagel v. MacLean*, 283 U.S. 266 (1931). This Court recently applied this rule in *Michel v. State of Louisiana*, 350 U. S. 91 (1955). It was there held that where the defendant in a State court prosecution did not raise

certain contentions in the lower courts, the Supreme Court on certiorari could not consider the question. Respondent contends that Petitioner, being a mature man of average intelligence, had "a reasonable opportunity" to have these new issues as to his claimed denials heard and determined by the State courts. *Parker v. Illinois, supra; Paterno v. Lyons*, 334 U.S. 314 (1948).

II.

THIS PETITION, ON THE FACTS, HELPS SUBVERT THE TRADITIONAL AND PROPER FUNCTION OF THE WRIT OF HABEAS CORPUS.

If Petitioner's theory of allowing the Supreme Court to review every imaginable idea concocted by convicts located throughout the United States, without requiring them to perfect their appeals to the higher State courts, was pursued to its logical conclusion, our complete judicial system would break down. The writs of habeas corpus and attendant certiorari are simply not the remedies on which an accused is entitled to a complete and full review of his case. Habeas corpus (and thus certiorari in these cases), had its ancestrial beginning during the Roman Empire. Church, *Habeas Corpus*, 2d ed. 1893, 2-3. The Great Writ serves only one purpose, and that is to afford the accused an opportunity to present allegations to a court which show an illegal confinement. The writ of habeas corpus has been well described as "the best and only sufficient defense of personal freedom." *Ex Parte Yerger*, 8

Wall 85, 95. It has also been called by Hallam "the principal bulwark of English liberty." The writ never was and never should be used as a Federal appeal statute whereby the effectiveness of the state criminal courts can be destroyed.

The passage of sixteen (16) years makes it difficult, if not impossible, to reconstruct the precise facts surrounding the conviction. The assertion by Petitioner that he was denied a fair and just trial in 1944 did not arise until all of the witnesses and officers of the court were deceased save two. Now Petitioner alleges an irregularity in that proceeding of long ago. The trial judge is dead and the then district attorney, now United States District Judge Joe Fisher, has no independent recollection of the precise facts of this case. Neither does Mr. Sexton, the then County Attorney, recall the incidents surrounding the trial. It is common in habeas corpus and certiorari cases for affidavits of the trial judge, the arresting officers, and other witnesses to be obtained as exhibits to accompany the application or response. In this way, the allegations or refutations are supported. Frequently, a petitioner will attempt to substantiate the assertions made in his petition by his own self-serving affidavit or that of a close relative. The State is, therefore, required to seek out, in the county of conviction, the participants in the trial to obtain their contradicting affidavits. By reason of the volume of criminal cases, this is often difficult and after a passage of a long period of time, practically impossible. Usually, as here, death and fading memory take

their toll. In *Betts v. Brady*, 316 U.S. 455 (1942), the test for determining denial of due process on the basis of lack of counsel was firmly established by this Court in 1942. In spite of the fact that the rule of *Betts v. Brady, supra*, existed at the time of Petitioner's conviction, and numerous other cases have since been decided on this point, Petitioner waited many years to initiate this proceeding.

In effect, the affidavit procedure requires that the basic facts of the case be re-examined and the State is put to a re-trial in the Federal courts without benefit of witnesses or jury. With no witnesses on the scene who can remember the exact circumstances surrounding the trial to refute his contentions, Petitioner conveniently chose to attempt to reopen the facts relating to his arrest and conviction. Petitioner's self-serving assertions are so tardily alleged that they should be disregarded.

Respondent suggests that the one question properly before this Court was considered and found to be without merit in 1960 on habeas corpus by the Texas Court of Criminal Appeals, the highest Texas Court having criminal jurisdiction.

The policy questions involved here are, Respondent believes, of great importance. Should a convicted felon, who failed to appeal his conviction and attempted no legal process for sixteen (16) years, be allowed to re-open a case with allegations of denial of due process involving questions of fact, at a time far distant from the date of his conviction, almost at his own pleasure?

Respondent urges this honorable Court to consider the effect which its reversal and remand of this case may have on our system of criminal jurisprudence.

In the first instance, such a decision could, in fact, swing open prison gates throughout the country. It could allow the release of countless convicted felons who find in this precedent a vehicle for substantiating a groundless charge of denial of due process. Such an assertion, without merit as it may be, can become dignified and gain credibility, because the passage of time has rendered the State helpless to discredit it adequately.

Respondent again insists that the one and only question now properly before this Court is whether Petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution by virtue of his being tried without counsel.

Respondent contends that examination of the record reflects that the trial judge conducted the trial in a fair and just manner, and that under the rules of *Brown v. Allen*, *supra*, *Betts v. Brady*, *supra*, and *Cash v. Culver*, 358 U.S. 633 (1959), the trial was fundamentally fair and just, that it did not reflect a vital flaw in the conduct of the case in the State courts, and that Petitioner was accorded all aspects of due process of law under the Fourteenth Amendment to the United States Constitution.

This case is another in an avalanche of habeas corpus proceedings which the State of Texas has been required to defend during the past four (4) years. This swelling flood of such cases has engulfed the office of the Texas Attorney General with endless litigation in the Federal courts in the habeas corpus field. Since January, 1957, there have been approximately three hundred seventy-five (375) habeas corpus and certiorari petitions from imprisoned Texas felons filed in the United States District Courts and in this Court. This has constituted a substantial and rapidly increasing part of our case load. Almost without exception these petitions have alleged a denial of due process of law under the Fourteenth Amendment on the grounds that the Petitioner was not represented by counsel at all, that he was inadequately represented, that improper evidence was admitted, or that a confession was extorted and coerced. The prison lawyers invariably cling to the identical assertions and rarely vary the form or content of their allegations from one case to the next.

For the most part, these contentions represent an attempt to re-open the facts in a case which has been decided by a judge and jury in a Texas State Court where the conviction has been upheld on appeal. In almost every case, habeas corpus on the same contentions has been denied by the Texas Court of Criminal Appeals.

Frequently, the case remains in the Federal courts several years. Under the normal procedure, after our

Texas appellate court denies habeas corpus, an application is made for certiorari to this Court. In most instances that application is denied. Having then exhausted the State remedies, the next step for the prisoner is an application for writ of habeas corpus, alleging the same grounds as before, to a United States district court. If this is denied, as we find is done in about ninety-eight percent (98%) of the cases, an appeal from that denial is taken to the United States Court of Appeals. After that Court sustains the district court's holding, the prisoner then sometimes attempts to reach this Court again by certiorari based upon the denial of habeas corpus in the lower Federal courts. All of this may take three or four years. We have observed that after this arduous series of proceedings, an unsuccessful petitioner then may attempt to start the complete process over by a completely new petition alleging slightly different grounds with new assertions of denial of due process. It is quite difficult in any of these cases to ever consider a judgment of conviction *final* as a matter of law.

As this Court so cogently pointed out in *Brown v. Allen*, *supra*, there must be some finality to judgments of conviction. Is this never-ending process which has evolved in the habeas corpus field obscuring and submerging the legitimate purpose of the traditional writ? We believe that it is. This taxing of habeas corpus and certiorari jurisdiction of the Federal courts has made it increasingly difficult for either the Courts or the State which is called up to defend to keep "adjudication of such

matters in managable proportions." As Mr. Justice Frankfurter observed in his opinion in *Brown v. Allen, supra:*

> "Experience may be summoned to support the belief that most claims in these attempts to obtain review of State conviction are without merit. Presumably they are adequately dealt with in the State courts . . . I am aware that misuse of legal procedures, whereby the administration of criminal justice is too often rendered leaden-footed, is one of the disturbing features about American criminal ju-tice."

Respondent agrees with Mr. Justice Frankfurter that "the meritorious claims are few."

To be sure, we recognize the importance of the writ, but this very recognition impels us to help maintain its purity and valid application. We concur with Mr. Justice Frankfurter that:

> ". . . its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments . . . Abuse of the writ may undermine the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization." *Brown v. Allen, supra.* (Opinion of Mr. Justice Frankfurter inviting the attention of a Federal court when confronted with a petition for writ of habeas corpus), p. 512.

Respondent views this case as another abuse of the writ, which, when taken with the great mass of other such cases, will ultimately result in eroding and stagnating the orderly administration of justice.

Respondent is in total accord with the views of the late Mr. Justice Jackson, as expressed in 1953. In a concuring opinion in *Brown v. Allen*, *supra*, at page 536, he commented on the alarming conditions of a growing tendency to litigate ill-founded habeas corpus claims in these words:

> "The fact that the substantive law of due process is and probably must remain so vague and unsettled as to invite far fetched or borderline petitions, makes it important to adhere to procedures which enable Courts readily to distinguish a probable constitutional grievance from a convict's mere gamble on persuading some indulgent judge to let him out of jail. Instead, this Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own. Judged by our own disposition of habeas corpus matters, they have, as a class, become peculiarly undeserving. It must prejudice the occasional meritorious applications to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search . . . In this multiplicity of worthless cases, states are compelled to default or to defend the integrity of their judges and their official records sometimes concerning trials or pleas that were closed many years ago. State Attorneys General recently have come habitually to ignore these

proceedings, responding only when specially requested and sometimes not then. Some State courts have wearied of our repeated demands upon them and have declined to further elucidate grounds for their decisions. The assembled Chief Justices of the highest courts of the States have taken the unusual step of condemning the present practice by resolution. [Conference of Chief Justices—1952, 25 State Government, No. 11, p. 249] . . . Once upon a time the writ could not be substantiated for appeal or other reviewing process but challenged only the legal competence or jurisdiction of the committing court. Conflict with State courts is the inevitable result of giving the convict a virtual new trial before a Federal court sitting without a jury. It is sometimes said that *res judicata* has no application whatever in habeas corpus cases and surely it does not apply with all its conventional severity. Habeas corpus differs from the ordinary judgment in that, although an adjudication has become final, the application is renewable, at least if new evidence and material is discovered or if, perhaps as the result of a new decision, a new law becomes applicable to the case. This is quite proper so long as its issues relate to jurisdiction. But call it *res judicata* or what one will, courts ought not to be obliged to allow a convict to litigate again and again exactly the same question on the same evidence. Nor is there any good reason why an identical contention rejected by a higher court should be reviewed on the same facts in a lower one."

It has also been our experience in dealing with these cases that it is the increasing tendency for convicts to litigate over and over essentially the

same contentions by filing new petitions with the alleged points of error differently stated. By making it appear that they are raising new allegations, the ordinary petitioner can spend years prosecuting his applications from one court to the next. The end result of this practice is a maze of interminable litigation which clogs both State and Federal courts and the offices of the State Attorneys General. We think it necessary to the protection of the cherished Writ of Habeas Corpus that our methods and practices be re-examined and altered to weed out the hoard of frivolous applications. In so doing, the just claims can more speedily and effectively receive the corrective attention which they deserve.

III.

THE TEXAS COURT OF CRIMINAL APPEALS RULED CORRECTLY IN DENYING HABEAS CORPUS AND IN FINDING THAT PETITIONER WAS NOT DEPRIVED OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY REASON OF REPRESENTING HIMSELF WHEN CHARGED IN A STATE COURT WITH A NON CAPITAL FELONY OFFENSE, INFORMED THE COURT THAT HE HAD NO ATTORNEY, FAILED TO REQUEST THE APPOINTMENT OF COUNSEL TO REPRESENT HIM, AND MADE NO MOTION FOR A CONTINUANCE FOR ANY REASON.

The Texas criminal procedural rules have never required that counsel be appointed to represent one charged with a criminal offense excepting cases in which one is arraigned on an indictment for a capital offense. See Articles 491 and 494, Vernon's Texas Code of Criminal Procedure. *Hill v. State* 310 S.W.2d 588, (1958), held that since felony theft is not a capital offense, Article 494 does not apply. It is implicit in these Texas statutes that one under indictment for a non capital felony offense is allowed to represent himself at his trial. In such instances, it is not incumbant on the trial judge to appoint counsel, whether or not it is requested, unless the absence of counsel will be so detrimental to the defendant as to result in a trial which is not fundamentally fair and just. *Betts v. Brady, supra.* Article 494, as amended in 1959, has not been construed by a Texas court. It is not yet settled whether this statute, as amended, requires appointment of counsel in all felony cases, or leaves the law unchanged. In any event, this 1959 amendment to the Texas law is not a material consideration here. The state of the Texas law under Article 494, as it existed in 1944, must be controlling because Petitioner was convicted in 1944. This was fifteen (15) years before the State law was amended. No *ex post facto* application can be given to the amended statute. Whatever its meaning, it cannot relate back to the time of Petitioner's trial.

The ultimate consideration here is the fundamental fairness of Petitioner's trial. We think the record plainly resolves this question in favor of Respondent.

It has been held that where a defendent is tried in a State court for violation of State law, the procedure prescribed by the State Legislature for trial of criminal cases, and not the procedure prescribed in the Sixth Amendment to the United States Constitution, must be followed. *Holton v. State*, 143 Tex. Cr. R. 415, 158 S.W.2d 722; reh. den. 143 Tex. Cr. R. 419, 158 S.W.2d 775; cert. den. 316 U.S. 703 (1942).

It was held in *Holton v. State, supra*, that:

> "... the court is not required to appoint an attorney unless the accused is being arraigned and is too poor to employ counsel. Therefore, in view of Article 491, supra, this court has heretofore held that the trial court is only required to appoint an attorney when the accused is charged with a capital offense since there is no arraignment of one charged with crime except in capital cases." (Citing authorities)

This case was reviewed by the United States Supreme Court and writ of certiorari was denied in 316 U.S. 703 (1942).

In *Ex Parte Hope*, 154 Tex. Cr. R. 456, 228 S.W. 2d 171, it was stated:

> "An arraignment is had in Texas only upon one being tried for a capital offense. Art. 491, C.C.P. Only those tried for such capital offenses are entitled under our laws to the services of court-appointed counsel. Art. 494, C.C.P. Upon a dismissal of the capital portion of this offense, under our statute, the trial court was

under no duty to appoint counsel." (Citing authorities)

It has been settled by this Court that each State has the right and authority to prescribe the rules and procedures by which it wishes her criminal courts to try and hear her criminal cases, and these State rules will not be set aside unless a defendent has been deprived of due process which is guaranteed to him under the Fourteenth Amendment of the Constitution of the United States. *Gallegos v. Nebraska*, 342 U.S. 55 (1951), *Wolf v. Colorado*, 338 U.S. 25 (1949), *Adamson v. California*, 332 U.S. 46 (1947). It has long been the law in Texas that appointment of counsel is required only in capital felony offenses. *Lopez v. State*, 46 Tex. Cr. R. 473; 80 S.W. 1016; *Faggett v. State*, 122 Tex. Cr. R. 399, 55 S.W. 2d 842; *Thomas v. State*, 132 Tex. Cr. R. 549, 106 S.W. 2d 289. This State procedural law was discussed and considered by this Court in *Betts v. Brady, supra.*

This honorable Court has written much, and a number of cases have been adjudicated on this point. It is clear that the rule which was recently enunciated in *Cash v. Culver, supra*, governs in cases of this nature. It was there held that:

"Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be

> fundamentally unfair, the Constitution requires that the accused must have legal assistance at his trial *Ureger v. Pennsylvania*, 335 U.S. 437-441."

We think that the fairness of any trial depends, in the main, on the wisdom and understanding of the trial judge. He knows the essentials of a fair trial.

Each case must, therefore, be looked to individually to ascertain the facts in order to decide whether one was deprived of due process of law in that instance. In reviewing this determination by the trial court, it must be remembered that the trial judge, observing the petitioner's conduct, apparent normal intelligence, alertness, awareness of the issues, and general demeanor at the time of trial, possessed the best information available as to the fairness and adequacy of the trial. His action should be given much weight and his judgment should be accorded great consideration in view of his knowledge of all the circumstances of the trial. His honest discretion is of high importance and must be respected unless patently erroneous. We suggest that here the trial judge's determination was sound. This latitude of judgment on the part of the trial court is discussed in *Betts v. Brady, supra*:

> "... we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deem proper, to appoint counsel when that course seems to be required in the interest of fairness."

This Court also there expressed the view that:

> "The Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness. We cannot say that the Amendment embodies an inexorable command that no trial for any offense, or any Court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."

It is now the well defined rule that the Constitution of the United States does not guarantee to a defendant charged in a State Court with a non capital offense an attorney except in a case where the gravity of the crime and other factors i.e., the age and education of defendant, the conduct of the court or the prosecuting officials, the complicated nature of the offense charged and the possible defense thereto, render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair. *Betts v. Brady, supra; Ureger v. Pennsylvania, supra.*

Respondent believes that Petitioner has failed to establish that a vital flaw existed in the conduct of his trial in the State court, that such trial was unfair and that his constitutional rights were not protected. In that connection, Respondent calls the Court's attention to the following circumstances surrounding the trial:

At the time of trial Petitioner was a mature, twenty-five (25) year old man, had received six (6) years of formal education, could read and write, and spoke

in a coherent manner, and every indication is that he had at least average intelligence. *Foster v. Illinois*, 332 U.S. 145 (1947). We do not contend that any layman could defend himself as well as could a reasonably competent lawyer, and we do not contend that he was as well represented by himself as he would have been had he had a lawyer. We readily admit that under the adversary system it is more likely that justice will result if a defendant is represented by a lawyer of his own choosing, and this not being available, a court appointed attorney is far preferable to no attorney at all. However, the law is that a man does have a right to defend himself, and this defendant did defend himself. The precise law question is whether or not his defense of himself resulted in an adequate development of the facts and a fair trial. The passage of sixteen (16) years has deprived the State of the witnesses who could throw the most light on this question. We contend that there is nothing apparent on the face of the record to indicate that he received anything but a fair trial, and that if, under the circumstances, the Court goes beyond the record in the case and takes the ex parte and self-serving statements of the convicted Petitioner himself at full face value when they cannot be refuted, it makes formal processes of justice as quicksand. It is absolutely necessary that the processes of government have some firmness and stability. The law on this subject began developing in the 1942 case of *Betts v. Brady, supra*, which was two (2) years prior to Petitioner's conviction. At the time of his conviction the rule of law on this point was thus firmly established. Under

these circumstances, the State contends that this Court should look primarily to the impartial evidence available on the central question of this case and not raise presumptions that public officials did not do their duties when there is no reliable evidence to impeach the judgment of the district court, or the official conduct of the district attorney, or the judgment of the Court of Criminal Appeals on habeas corpus. There should be a strong presumption that District Attorney Joe Fisher did not overreach this defendant, but that under the law and his duty accorded him all and every consideration that our law gives to an individual charged with a crime, and that the district judge in these circumstances bent over backwards to see that an innocent man was not convicted. Why should State officials desire to convict an innocent man? That is so contrary to the good conscience of public officials that no presumptions, implied or otherwise, should be indulged in to question their integrity or their performance of duty. This Court pointed up the desirability of resolving all doubts in favor of public officials in *Bute v. Illinois*, 333 U.S. 640, 672 (1948):

> "Doubts should be resolved in favor of the integrity, competence, and proper performance of their official duties by the Judge and the State's Attorney. They were State officials lawfully chosen to discharge serious public responsibilities under their oaths of office. Especially in a self-governing State and Nation, governmental stability depends upon the giving of full faith and credit in form, substance and spirit to public acts, records and judicial proceedings not

only among the States, but among individuals and between their State and Federal Governments."

The charges against Petitioner were stated in simple terms, not ordinarily capable of being misunderstood by a grown man, however elementary or primitive his understanding. (R. 1-indictment).

As this Court went on to say in *Bute v. Illinois, supra:*

> "It is suggested that an error of omission appears in the failure of the records to show either the presence of counsel for the accused, or an inquiry by the court as to counsel for the accused, or the appointment of counsel by the court to assist the accused. Here also, *if any presumption is to be indulged, it should be one of regularity rather than that of irregularity. . . . Doubts should be resolved in favor of the integrity, competence, and proper performance of their official duties by the judge and the State's attorney.*

Petitioner's direct and cross-examination of witnesses and his own testimony clearly shows a grasp of the facts of the case. In short, Petitioner's conduct of his defense indicates a normal alertness sufficient to show that he was not unduly handicapped by the lack of counsel. While the trial court restrained Petitioner from injecting his own testimony into his examination and cross-examination of other witnesses, he was given full and uninterrupted opportunity to testify in his own defense.

When Petitioner took the witness stand to testify, he automatically opened the door to cross-examination by Mr. Fisher as to his previous conviction record. The inquiry as to his prior imprisonment was directed to Petitioner for purposes of impeaching his credibility and was so limited. His own reference to serving a sentence in a Louisiana prison was admitted as a part of his voluntary confession and since the court found the confession, itself, was admissable, this statement, as contained therein, was likewise properly admitted. Article 732a, Vernon's Texas Code of Criminal Procedure; *Neill v. State*, 158 Tex. Cr. R. 551, 258 S.W.2d 328.

Directing our attention to the remaining grounds now asserted, Respondent maintains that, as discussed under Question I, the Court should not reach these assertions. If, however, the Court considers these new allegations on their merits, Respondent believes that it will find them to be without merit.

A. The voluntary confession, while repudiated by Petitioner, was not shown to the satisfaction of the Court, to be coerced. Constable Williamson testified in response to a question by Petitioner that he did not jerk him out of a car and beat him up in Louisiana (R. 12, 13). He stated that he did not touch Petitioner when he was apprehended in Louisiana. Petitioner was aware of the import of his confession. He stated therein that "I realize that by making this voluntary statement that the same can be used against me or my trial" (R. 17). In later testimony, Constable Williamson was asked by Mr. Fisher if he or Officer Thompson "put these scars

on his [Petitioner's] body." He replied, "No sir." When asked if he hit him or beat him in any way to make those scars, he answered, "No" (R. 31). The record does not contain any evidence suggesting that any officers at any time beat or threatened to beat Petitioner to cause him to sign the confession which he himself described as being a "*voluntary statement* in writing to the said W. P. Sexton" (R. 16). He understood that "I do not have to make any statement at all . . ." (R. 16).

Can there be any doubt that the trial judge, in admitting the confession, considered that Petitioner's testimony, in repudiating it on the witness stand, was controverted by responsible law enforcement officers of Orange County, Texas?

B. It is clear from the arresting officers testimony that he apprehended Petitioner in Louisiana after chasing him in "hot pursuit" across the State line (R. 12, 13). Constable Williamson, when asked by Mr. Fisher if he [Petitioner] was hard to catch, testified that "he gave us a good race . . ." (R.31). Petitioner stated that "I returned from Louisiana voluntarily with Mr. Hop Williamson." There is nothing in the record to support Petitioner's assertion in his brief at page 27 that "if Petitioner in fact agreed to return with the Texas officers as the officer claimed, and thereby waived his rights to an immediate hearing in Louisiana and to extradition, Petitioner did so after being beaten." It was Petitioner who said that he returned from Louisiana voluntarily (R. 16).

C. Petitioner asserts that he was subjected to interrogation which improperly raised the issue of his character and reputation. The questions to which he refers on page 32 of his brief related to whether he could produce any witnesses to the alleged threats resulting in the confession. Petitioner stated that he had a witness to threats against him by Mr. Thompson (R. 24). All of Mr. Fisher's subsequent questions, which Petitioner now contends were improper, inquired about why Petitioner had not produced any witness that he might have. Mr. Fisher asked: "Can't you tell the Sheriff to serve subpoenas on the witnesses?" (R. 25). "You don't have anybody interested enough to come over here and look after you?" (R. 28). "You could write some letters?" (R. 28). Each question was directed to Petitioner only after he had contended that he could produce a witness. Mr. Fisher was simply attempting to determine whether Petitioner, in fact, had any witnesses at all, and, if so, where they were. Certainly, these questions were not intended to, and did not bear up Petitioner's character and reputation in any way.

Respondent recalls the language of this honorable Court in *Betts v. Brady*, *supra*, at page 471:

> ". . . in the great majority of the states it has been the considered judgment of the people, their representatives, and their courts that an appointment of counsel in criminal cases is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy."

Respondent believes that in allowing Petitioner to represent himself, the trial judge was cognizant of, and gave consideration to, the criteria which has been systematically established by this Court to ascertain the fairness and justice of a trial. After

studying the record we are convinced that the age, ordinary intelligence, lack of request for counsel, awareness of the nature and import of the charge, and the simplicity of the indictment and the defenses thereto all weighed heavily in the Court's decision to allow Petitioner to represent himself. We view the judge's conduct of the trial and the district attorney's presentation as fundamentally fair and just in every aspect.

CONCLUSION

The Court of Criminal Appeals of Texas correctly denied Petitioner's application for writ of habeas corpus. On the facts presented, Petitioner has not established that he was deprived of due process of law under the Fourteenth Amendment to the United States Constitution at the time of his trial. Respondent contends that Petitioner's trial was fundamentally fair and just, and that he was accorded all aspects of due process under the State and Federal laws. For these reasons, Respondent believes that this Court should affirm the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted,

WILL WILSON
Attorney General of Texas

B. H. TIMMINS, JR.
Assistant Attorney General
of Texas

LINWARD SHIVERS
Assistant Attorney General
of Texas
Attorneys for Respondent
Capitol Station
Austin, Texas

No. 561

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

JAMES M. BUSHNELL,
Petitioner

vs.

O. B. ELLIS, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

Certificate of Service

I, B. H. Timmins, Jr., Assistant Attorney General of Texas, do now enter my appearance in the Supreme Court of the United States in the above captioned cause in behalf of Respondent; I do further certify, as Attorney for Respondent, that two (2) copies of the foregoing brief have been forwarded by United States air mail, first class, postage prepaid, to Mr. Percy D. Williams, 3100 Gulf Building, Houston 2, Texas, counsel for Petitioner, on this —— day of April, 1961. The above service is made in compliance with Rule 33 of the Supreme Court Rules.

B. H. TIMMINS, JR.
Assistant Attorney General
of Texas

Capitol Station
Austin, Texas

SUPREME COURT OF THE UNITED STATES

No. 561.—October Term, 1960.

James M. Bushnell, Petitioner, v. O. B. Ellis, Director, Texas Department of Corrections. } On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[May 22, 1961.]

Per Curiam.

The judgment of the Court of Criminal Appeals of Texas is reversed and the cause is remanded to that court with directions to grant petitioner a hearing upon his petition for a writ of habeas corpus. *Uveges* v. *Pennsylvania*, 335 U. S. 437; *Cash* v. *Culver*, 358 U. S. 633; *McNeal* v. *Culver*, 365 U. S. 109.

Mr. Justice Stewart took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 561.—October Term, 1960.

James M. Bushnell, Petitioner, v. O. B. Ellis, Director, Texas Department of Corrections. } On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[May 22, 1961.]

Mr. Justice Clark, with whom Mr. Justice Frankfurter and Mr. Justice Harlan join, dissenting.

This application for the issuance of a writ of habeas corpus was filed as an original action in the Court of Criminal Appeals of Texas. Neither the record, the briefs, nor argument of counsel indicate that such an action has ever been filed in a District Court of Texas as appears to be required by Texas procedure. See *Ex parte Rodriguez*, — Tex. Cr. R. —, 334 S. W. 2d 294 (1960); *Ex parte Fitzpatrick*, 167 Tex. Cr. R. 376, 320 S. W. 2d 683 (1959); *Ex parte Brooks*, 85 Tex. Cr. R. 397, 212 S. W. 956 (1919). The judgment of the Court of Criminal Appeals might, therefore, have been based upon an independent state ground. In this condition of the record, I would affirm the judgment without prejudice to the petitioner filing in any appropriate Texas District Court an application for a writ of habeas corpus to test out the validity of his detention. See Vernon's Tex. Code Crim. Proc., Art. 119.